

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED MAR 24 1941

Joseph W. Stewart
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APPENDIX TO APPELLANT'S BRIEF

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

755

JANUARY TERM, 1941

No. 7830

DISTRICT OF COLUMBIA, A MUNICIPAL
CORPORATION, *Appellant*.

vs.

GEORGE G. RICHARDS, *Appellee*.

Appeal from the District Court of the United States for the
District of Columbia

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a DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

At Law No. 89423

GEORGE G. RICHARDS, Plaintiff,

vs.

DISTRICT OF COLUMBIA, a Municipal Corporation, et al.,
Defendants.

UNITED STATES OF AMERICA,
DISTRICT OF COLUMBIA, ss:

BE IT REMEMBERED, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA

At Law No. 89423

FILED OCT. 6, 1937

GEORGE G. RICHARDS, 18-Nicholson St. N.W., Washington,
D. C., Plaintiff,

vs.

DISTRICT OF COLUMBIA, a Municipal Corporation, District Building, Washington, D. C., and JOHN R. STONE, Eastern Market, Washington, D. C., Defendant.

DECLARATION

The plaintiff, George G. Richards, sues the defendants, District of Columbia, a Municipal Corporation, and John R. Stone, because of the following facts and circumstances:—

1. That heretofore, to wit, on the 2nd day of July, 1936, and for a long time prior thereto, the defendant, the District of Columbia, a Municipal Corporation, created and existing under and by virtue of the laws of the United States, owned, operated, controlled and exercised a proprietary interest in and over a certain public market building, known as, to wit, the Eastern Market, located at, to wit, 7th Street, Southeast, between C Street and North Carolina Avenue, Southeast, Washington, District of Columbia, at which said market building the said defendant, the District of Columbia, leased a number of stalls or booths to divers persons who sold and dispensed merchandise and foodstuffs to members of the public; and the said defendant, the District of Columbia, acting through its agents, servants and employees, retained and exercised a proprietary control and supervision over the floor, aisles, and walks of the said market building generally intended for and

used by members of the public coming into said market building, and did invite the general public to come into said market building for the purpose of purchasing food stuffs and other merchandise from the proprietors of said stands or stalls in said market building; and on the day and year aforesaid the defendant, John R. Stone, was the owner or lessee of, and did exercise a proprietary interest in and control over, a certain stand or stall in said market building situated in, to wit, the southeast corner of said market building, at which stand or stall the said defendant, John R. Stone, sold and dispensed to the public sea food and other merchandise, and did hold out to the public an invitation to come to said stand or stall and make purchases from said defendant; and on the day and year aforesaid, the plaintiff entered said market building, under the said invitation of the said defendants, for the

purpose of transacting business with and making purchases from the proprietors of said stands and stalls in said market building, and while in said market building did go upon one of the said aisles or walks in said market building to the front of the said stand or stall of the said defendant, John R. Stone, near, to wit, the said southeast corner of said market building.

2. And the plaintiff says that it then and there became, and was, the duty of the defendants to exercise due care, caution and prudence to maintain and keep the said aisle or walk in front of the said stand or stall of the defendant, John R. Stone, in a safe and proper condition so as not to cause injury to persons lawfully in said market building for the purposes aforesaid, including the plaintiff, and not to do, or omit to do, any act or thing which would in anywise endanger or jeopardize the safety of such persons, including the plaintiff.

3. Yet the plaintiff says that, notwithstanding their duty in the premises, said defendants, at the time and place and under the circumstances and conditions aforesaid, did not exercise such care, caution and prudence, in this:—That the defendant, John R. Stone, and his agents, servants and employees, acting in his behalf, and the defendant, the
3 District of Columbia, acting through its agents, servants and employees,

(a) Carelessly and negligently kept and maintained the floor of the said public aisle or walk in front of said stand or stall of the said defendant, John R. Stone, in a slippery and dangerous condition;

(b) carelessly and negligently allowed and permitted water and other substance, to wit, pieces of ice, to be spilled and to remain on the floor of said aisle so as to cause the floor of said aisle, at the place aforesaid, to be in a damp, wet, slippery and unsafe condition;

(c) carelessly and negligently failed and omitted to wipe up and remove said water and other substance from the floor of said aisle although the defendant, John R. Stone, and his agents, servants and employees acting in his behalf, and the

defendant District of Columbia, acting through its agents, servants and employees, knew, or in the exercise of due care should have known, that said floor was in a slippery and unsafe condition;

(d) carelessly and negligently failed and omitted to sprinkle said floor, at the place aforesaid, with sawdust or other substance so as to prevent the same from being slippery and causing injury and damage to members of the public, although the defendant, John R. Stone, and his agents, servants and employees, acting in his behalf, and the defendant, the District of Columbia, acting through its agents, servants and employees, knew, or, in the exercise of due care, caution and prudence should have known, that said floor, at the place aforesaid, was in a slippery, dangerous and unsafe condition;

(e) carelessly and negligently failed and omitted to warn members of the public, including the plaintiff, lawfully in said market, of the said slippery, dangerous and unsafe condition of said floor at the place aforesaid.

4 4. And the plaintiff says that, due to the said carelessness and negligence of the defendant, John R. Stone, and his agents, servants and employees, acting in his behalf, and the defendant, the District of Columbia, acting through its agents, servants and employees, the plaintiff, as he was walking upon and along the floor of said aisle, at the time aforesaid, near and in front of the said stand or stall of the defendant, John R. Stone, was caused to slip and fall with great force to the floor of said market building; whereby and by reason whereof the person of the plaintiff was severely and permanently injured.

5. And plaintiff further says that due to said carelessness and negligence he sustained, to wit, the following injuries:—

(a) a severe and permanent injury to his right arm, plaintiff's right arm having been fractured;

(b) a severe and permanent injury to his right wrist, and to his right hand, plaintiff's right wrist and right hand having been badly sprained;

(c) a severe and permanent injury to his right hip, plaintiff's right hip having been badly bruised and sprained;

(d) a severe and permanent injury to his heart;

(e) a severe and permanent injury to his back;

(f) a severe and permanent injury to his head, causing plaintiff to suffer from headaches and dizzy spells;

(g) a severe and permanent injury to his nervous system, rendering him permanently nervous;

(h) and plaintiff was otherwise rendered sick, sore, lame and disordered, and was otherwise severely and permanently injured.

All of which has caused the plaintiff to suffer in the past, and he will continue to suffer permanently, from time to time in the future, severe physical pain and mental anguish.

6. And plaintiff alleges that due to his injuries he was confined to his bed for a long period of time, and was compelled to be treated by physicians and surgeons, and to expend money and incur indebtedness for medical care and attention, hospitalization, x-rays, nursing services, medicines and accessories in and about an effort to cure his said injuries and to relieve and modify his said pain and suffering; and that plaintiff will be, from time to time in the future, compelled to expend money and incur indebtedness for medical care and attention, medicines and accessories in and about an effort to cure his said injuries, and to relieve, modify and reduce said pain and suffering.

7. And plaintiff says further that because of his injuries aforesaid, he has been, from time to time in the past, and will be, from time to time in the future, unable to attend to and perform his customary occupation and business activities, and that plaintiff has thereby lost earnings and emoluments which would otherwise have accrued to him from his said occupation and business activities, and that plaintiff will, from time to time in the future, lose emoluments which would otherwise accrue to him from his said occupation and business activities.

8. And plaintiff further says that due to said carelessness and negligence plaintiff's general health has been, and is, permanently impaired; that he has suffered severe pain of body and mind, from long and continued suffering, loss of appetite, loss of weight, and nervousness, and that plaintiff has been unable to sleep well at night due to his injuries aforesaid.

9. And plaintiff further alleges that, due to his said injuries, he has been, in the past, and will be, from time to time in the future, unable to enjoy his customary recreation and pleasures, and that plaintiff has been deprived of other benefits and advantages which he would otherwise have enjoyed in the past and which he would otherwise enjoy in the future.

10. And lastly, the plaintiff says that, due to all of the foregoing, plaintiff has been, and is, damaged to the extent of Seventeen Thousand Five Hundred Dollars (\$17,500.00).

6 WHEREFORE, plaintiff brings this suit and claims of the defendants damages to the extent of Seventeen Thousand Five Hundred Dollars (\$17,500.00), besides the costs of this suit.

WILLIAM WENDELL,
WILLIAM WENDELL,
Attorney for plaintiff,
Stewart Building,
Washington, D. C.

April 14/38

Amendment that notice was given to D. C. within six months.

JCA

7

FILED MAR. 30, 1938

PLEA

Comes now the District of Columbia, by its counsel, and for plea to the declaration and each and every count thereof ad-

mits that on July 2, 1936, and prior thereto, it was a municipal corporation existing under the laws of the United States; it admits that it owned, operated and controlled a public market known as Eastern Market at the time and place alleged; the defendant admits it leased stalls or booths in said building to divers persons, who sold merchandise or food to the public; the defendant admits that it rented to the co-defendant John R. Stone a certain stand or stall in said market building, and says the co-defendant John R. Stone exercised a proprietary interest in and control over said stand or stall in said building, subject to supervision by the Superintendent of Weights, Measures and Markets of the District of Columbia and regulations made by the Commissioners of the District of Columbia; it admits that co-defendant sold and dispensed sea food or other merchandise; it admits that the general public was invited to come into said building and to said stand for the purpose of making purchases from the co-defendant at the time and place alleged; the defendant is without knowledge or information sufficient to form a belief as to whether the plaintiff at the time and place alleged entered said market for the purpose of transacting business with or making purchases from the proprietors of any stands or stalls in said market, or whether the plaintiff went to the front of the stand or stall occupied by the co-defendant John R. Stone at the time and place alleged; the

8 defendant denies that it was negligent or failed to exercise due care or caution or prudence in the performance of any duty imposed on it in respect to maintaining or keeping any aisle or walk in said building in a proper or safe condition and denies that the aisle or walk in front of the stand or stall of the co-defendant John R. Stone was in an unsafe condition; and defendant further says that the floor of said aisle in front of the stand of said John R. Stone was designed and constructed in such a manner as to cause any water which might be placed or spilled on said floor to flow into a drain placed in said floor, that is to say, that the stand of the said John R. Stone was located in the extreme south-

eastern corner of said market between the door leading from said market to 7th Street and the door leading from said market to C Street and between two aisles in said market leading to each of said doors; and defendant says that there was a drain approximately $1\frac{1}{2}$ feet square and covered with a grating in front of the stand of the said John R. Stone and, to-wit, 4 feet north of the said C Street door; and defendant says that the grades of both of said aisles aforesaid sloped gradually from the said aisles toward said drain in such manner that any and all water in either of said aisles at or near the stand of said John R. Stone flowed naturally into the said drain; the defendant says it was without knowledge or notice, either actual or constructive, of any alleged dangerous or defective condition of any of said aisles in said building at the time and place alleged; the defendant denies that it negligently did any act or negligently omitted to do any act or thing which in any wise endangered or jeopardized the safety of the plaintiff or any other person at the time and place alleged; the defendant denies that at the time and place alleged it failed to exercise due care or caution or prudence in the manner alleged by the plaintiff, or in any manner whatsoever; the defendant denies that it carelessly or negligently kept or maintained the floor or aisle or walk in front of the stand or stall of John R. Stone in a slippery or dangerous condition, for the defendant says that the said floor or aisle or walk was in a reasonably safe condition at the time and place alleged, and

the defendant denies that it negligently or otherwise
 9 permitted or had knowledge or notice, either actual or constructive, of any alleged slippery or dangerous condition of said floor or aisle or walk at the time and place alleged; the defendant denies that it carelessly or negligently allowed or permitted water or ice or any other substance to be spilled or to remain on the floor of said aisle in front of the stand of said John R. Stone, or that it permitted said floor or aisle at the place aforesaid to become damp or wet or slippery, or so as to cause an unsafe condition at the time and place al-

leged, for the defendant says it was without knowledge or notice, either actual or constructive, of any alleged substance or water or ice or dampness that caused any slippery or unsafe condition at the time and place alleged; the defendant admits that it failed to wipe up or remove any water or other substance from the floor or aisle but denies that it carelessly or negligently failed to do so, for the defendant says it was without knowledge or notice, either actual or constructive, of any alleged water or other substance on the floor or aisle at the time and place alleged causing an alleged slippery or unsafe condition; the defendant admits that it failed to sprinkle said floor at the time and place alleged with sawdust or other substance but denies that it carelessly or negligently failed to do so, for the defendant says it was without knowledge or notice, either actual or constructive, of any alleged slippery or dangerous or unsafe condition; the defendant admits that it failed or omitted to warn the plaintiff or anyone else of any alleged slippery or unsafe condition of said floor at the time and place alleged but denies it was careless or negligent in failing to do so, for the defendant says that it was without knowledge or notice, either actual or constructive, of any alleged slippery or dangerous or unsafe condition of said floor at the time and place alleged; the defendant is without knowledge or information sufficient to form a belief as to the cause of the alleged accident or the injuries alleged to have been sustained by

the plaintiff, or any expense to which he is alleged to
 10 have been put, but denies that the alleged accident or injuries or expenses were caused by any negligence on the part of this defendant, for the defendant says it was without knowledge or notice, either actual or constructive, of any dangerous or unsafe condition at the time and place alleged; this defendant denies that it had any knowledge or notice, actual or constructive, of any alleged acts of negligence on the part of the co-defendant John R. Stone.

The defendant denies each and every allegation of fact in

the declaration and each and every count thereof not herein specifically admitted.

For a further plea to the declaration and each and every count thereof the defendant says that the plaintiff his action ought not to have or maintain for the injuries the plaintiff is alleged to have suffered, and the expense he is alleged to have incurred, were the direct and proximate result of his own negligence in that he failed to keep a proper look out for his own safety.

ELWOOD H. SEAL,
 ELWOOD H. SEAL,
Corporation Counsel, D. C.
 CHESTER H. GRAY,
 CHESTER H. GRAY,
Assistant Corporation Counsel, D. C.
 M. MAHORNER, JR.,
 M. MAHORNER, JR.,
Assistant Corporation Counsel, D. C.
 Counsel for Defendant District of Columbia,
 District Building.

* * * * *

16

FILED OCT. 31, 1940

VERDICT AND JUDGMENT

This cause having come on for hearing on 29th day of Oct. 1940, before the Court and a jury of good and lawful persons of this district, to wit:

Elwood L. Risk
 Joseph F. Ashford
 Harry L. Meador
 Ford McGarvey
 Charles R. Fadeley
 Charles M. Birkhead

Frances K. Lore
 Joseph F. Harris
 James W. Isherwood
 Oliver Atlas
 Meta F. O'Flaherty
 Richard O. Sullivan

who, after having been duly sworn to well and truly try the issues between George G. Richards, plaintiff and District of Columbia and John R. Stone, defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 31st day of Oct., 1940, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendants by reason of the premises is the sum of Seven hundred fifty dollars (\$750.00).

WHEREFORE, it is adjudged that said plaintiff recover of the said defendants the sum of Seven hundred fifty dollars (\$750.00), and defendants recover of the plaintiff their costs of defense.

CHARLES E. STEWART, *Clerk*,
 By J. WESLEY GARDNER, JR.,
Assistant Clerk.

By direction of
 Justice ADKINS
 Notices mailed 10/31/40
 Judgment entered
 J. W. G.

17

FILED NOV. 9, 1940

MOTION TO SET ASIDE VERDICT AND JUDGMENT

The defendant, the District of Columbia, moves the Court to set aside the verdict and judgment in the above entitled cause, and to enter judgment therein in accordance with this defendant's motion for directed verdict because neither actual nor constructive notice on the part of the District of Columbia

of the alleged defective condition of the aisle was proved.

RICHMOND B. KEECH,
 RICHMOND B. KEECH, CHG
Corporation Counsel, D. C.
 CHESTER H. GRAY,
 CHESTER H. GRAY,
Assistant Corporation Counsel, D. C.
 OLIVER GASCH,
 OLIVER GASCH,
Assistant Corporation Counsel, D. C.
 Attorneys for defendant, District of
 Columbia,
 District Building.

* * * * *

**ORAL TESTIMONY DESIGNATED BY APPELLANT
 FOR PRINTING**

37 George G. Richards, Plaintiff, on Direct Examination

By Mr. Wendell:

Q. Will you please state your full name to the Court and the ladies and gentlemen of the jury? A. George C. Richards.

Q. Mr. Richards, where do you now reside? A. 18 Nicholson Street, Northwest.

Q. Have you lived in the District of Columbia a great many years? A. I was born and raised in the District of Columbia.

38 Q. Did you used to work in the Navy Yard? A. I did, for 34 years.

Q. And retired from the Navy Yard? A. Yes, sir; seven years ago.

Q. And you are now 71 or 72 years of age? A. This is my 72nd year.

Q. Did you have occasion on the 2nd day of July, 1936, in the afternoon, to go to the Eastern Market? A. Yes, sir.

Q. For what purpose? A. To buy some fish.

Q. To what stand did you go for the purpose of buying fish?
A. Mr. Stone's, in the Southeast Market.

Q. He is a defendant in this case? A. Yes, sir.

Q. Mr. Richards, about what time in the afternoon was that? A. About 3 o'clock or quarter after 3; something like that.

Q. Do you know what two stalls there are north of Mr. Stone's stand? A. Where they sell cakes and bread and stuff like that.

Q. Do those two stands keep any ice there at all? A. No, sir; not that I know of.

Q. As you approached and went up to the stand, in front of the stand of Mr. Stone, will you tell the court and the ladies and gentlemen of the jury what happened? Just what happened when you went up there? A. It was on the second day of July—

39 Q. In 1936. Yes; I understand. What happened when you went up in front of the stand? A. I slipped on a piece of ice and on a wet floor—water.

Q. What foot? A. My left foot.

Q. Did your right foot slip, too? A. Yes, because it was on a wet floor. If it had been dry maybe I could have caught myself.

Q. In other words, your left foot slipped on a piece of ice and your right foot on the wet floor? A. Yes, sir.

Q. Does this picture represent the stand there (showing a photograph to the witness)? A. Yes, sir.

Q. You see where this drain is, do you not? A. Yes, sir; a cess pool there.

Q. How far was your left foot from that drain when it slipped on the ice? A. I guess, about 3 feet.

Q. Three or four feet? A. Yes.

Q. How far was your right one from the drain? A. About a foot from the drain.

Q. Can you state whether or not there was any water around there? A. Yes; there was water around there, all around.

Q. Around where? How far out? A. Up to here
40 (indicating). All this (indicating) was dry.

Mr. Gray. One moment. Let me see.

The Court. I think that had better be seen by the jury. As he is testifying about it they do not know what he is indicating. It is all right for the members of the jury to stand up if they want to, so that they can all see what he is trying to tell.

(The witness stood before the jury.)

By Mr. Wendell:

Q. You said there was water around there (indicating)? A. Yes.

Q. Was there any water up here at all? A. No, sir.

The Court. Where is that?

Mr. Wendell. He said there was water around here (indicating) but none up in here (indicating).

(The witness resumed his seat.)

By Mr. Wendell:

Q. Now, Mr. Richards, after you fell—which side did you fall on, by the way? A. The right side.

Q. Can you state whether or not your body covered this cess pool cover? A. A portion of it; yes; right in the corner.

Q. After you fell, what happened? Did you get up or did you stay down? A. I got up.

Q. Then what happened? A. Well, the man that worked behind the counter—

41 Q. For Mr. Stone? A. Yes; I can't think of his name—he came around and taken the lid off the top of the cesspool. It was stopped up with some kind of sediment or something; he taken a broom and swept all underneath the edge of the counter and swept the water and ice down in the pool and then put the lid back on it.

Q. You say he took the lid off and there was sediment or dirt in the lid. Do you mean, in the holes or where? A. It had slots in it.

Q. What did he do with the dirt and sediment? A. I suppose it went down in the cess pool.

Q. Did he clean it out? A. Yes, sir; of course. And then he laid it aside and swept the water and ice down in the cess pool and then put the lid back.

Q. After you fell, can you state whether or not your clothes were wet? A. Yes, sir; all on my right side.

Q. Could you see where he swept the ice from? A. Yes; he swept it right in front of the stand.

Q. From in front of the stand? A. Yes; from in front of the stand, right down into the cess pool.

The Court. You had better let him indicate that to the jury.

By Mr. Wendell:

Q. Indicate where the man swept the ice from. Show the jury where he swept the ice from. A. Here (indicat-
42 ing) is the cess pool right here. I fell right here, right in there (indicating). I slipped on a piece of ice with my left foot. It was all wet.

The Court. Where was the ice swept?

The Witness. Right along here (indicating).

By Mr. Wendell:

Q. Was there ice underneath here (indicating)? A. Yes, sir.

The Court. Down underneath the—

The Witness. Yes.

Mr. Wendell. They concede that there is a space back here (indicating).

Mr. Gray. I am sure that Mr. Richards indicated with a pencil that the ice was directly at the edge of this counter.

The Witness. I said some was in there and some underneath of it.

Mr. Gray. He was pointing to the very edge of it.

The Witness. The man swept with the broom as far as he could. He couldn't get no further.

By Mr. Wendell:

Q. But there was some ice out in front of the counter? Mr. Gray. He did not say that.

The Court. Please do not lead the witness. Please try to avoid that.

By Mr. Wendell:

Q. Was there any ice out in the aisle? A. Out in front where I fell.

Q. After this man took off the cess pool cover to clean it out, and swept the ice into it, did you leave? A. I
43 didn't leave right away. I had to go outside a few minutes.

* * * * *

47 **George G. Richards, Plaintiff, on Cross Examination
by Defendant District of Columbia**

By Mr. Gray:

Q. Mr. Richards, the lid that you referred to, on that drain, was a grating over the top of the drain, was it not? A. Yes.

Q. There wasn't any lid on top of the grating, was there?
A. On the cess pool.

Q. There is a grating? A. Yes.

Q. There was nothing on top of the grating; no lid on that, was there? A. Oh, no. Of course it was stopped up. There was a lot sediment got in that, because the man taken it off and cleaned it. I saw that when I got up after I fell.

Q. How did you go into the market? A. I went in the main entrance.

Q. Which is the main entrance? A. On the 7th
48 Street side, about middle way of the market.

Q. North of Mr. Stone's stand? A. Yes. The market runs north and south.

Q. There is a door, is there not, right here at the end of Mr.

Stone's stand (indicating)? A. Yes. It goes out on 7th Street.

Q. You did not come in that door? A. No, sir.

Q. The door you came in was farther north? A. Yes; the center of the market.

Q. Then you walked south along this aisle (indicating)? A. Yes, sir.

Q. As you approached Mr. Stone's stand could you see the aisle in front of you? A. I didn't pay any attention to it. I started to go up to the stand to purchase fish.

Q. Could you see this ice that you stepped on before you got there? A. No, sir.

Q. When did you first see the ice? A. After I fell; after I got up.

Q. When did you first notice that the floor was damp? A. I noticed there was water laying there.

Q. When did you first notice it? A. Not until I got up, after I fell.

Q. Was the whole aisle between Mr. Stone's stand and the stand directly across from it wet? A. No, sir; it was dry all over there.

49 Q. On the right side? A. Yes, sir; it was all dry.

* * * * *

50 Q. What day did you fall, Mr. Richards? A. The second of July.

Q. Do you remember what day of the week that was? A. On a Thursday.

Mr. Gray. Thank you. That is all.

**George G. Richards, Plaintiff, on Cross Examination by Code-
fendant John R. Stone**

By Mr. Davis:

Q. Mr. Richards, do you claim to have fallen at that trap (indicating)? A. Yes, sir; right near the trap; yes.

The Court. Just indicate that to the jury.

51 By Mr. Davis:

Q. How far is that trap from the wall or that door going out? A. A very short distance from the trap to the door, to this frame (indicating).

Q. How much distance? A. Oh, I never measured it.

Q. In your best judgment? A. I judge it is about a foot.

Q. How far, in your best judgment, does it extend out from that wall? A. From here (indicating)?

Q. Yes. A. About a foot.

Q. About a foot from the case, does it not? A. About that, I guess. I never measured it. It is right in that corner, I know.

Q. Where was that piece of ice that you claim to have fallen on, with reference to this (indicating)? A. Right in here (indicating). The ice and water was all down in here. This was all dry (indicating).

Q. Indicate just where it was.

The Court. Indicate to the jury. That does not help them a bit, you know.

By Mr. Davis:

Q. Where was the piece of ice on which you claim to have slipped? A. I don't know. It must have been more than one piece, because the man taken a broom and swept all
52 underneath there; he got ice underneath there (indicating).

Mr. Gray. I object to that.

The Court. Just answer the question. He is talking about the piece of ice on which you fell before there was any sweeping.

I got up he came from behind the counter—

The Witness. I fell on ice right in here (indicating). After

The Court. No; he did not ask you that. You have answered the question.

By Mr. Davis:

Q. You have indicated here where you fell, Mr. Richards. Tell us how far from the wall up this way (indicating), in feet, you fell. A. Oh, I guess about four feet.

Q. How far out from the case? A. It is a foot, I guess; about that.

Q. Do you know when this picture was taken? A. It was taken lately, I guess. I don't know when it was taken.

Mr. Davis. You admit, Mr. Wendell, that it was taken just a short time ago?

Mr. Wendell. Surely; taken yesterday.

Mr. Davis. Was it taken without any notice to the District? Nobody knew it was going to be taken?

Mr. Wendell. The marketmaster was down there.

Mr. Davis. I asked you a simple question. Did anybody in the market have any notice that this picture was going to be taken? Will you admit that they did not?

53 Mr. Wendell. I will admit that when the picture was taken I saw the marketmaster and told him I was going to take pictures down there. I think Mr. Stone was there.

By Mr. Davis:

Q. When you walked into that market did you have plenty of light to walk around there? A. Yes.

Q. You did not have any trouble to see, did you? A. I could see. Of course my eyesight isn't so good, but it was in the afternoon about 3 o'clock or quarter after 3; it was clear; the sun was shining.

Q. And the place you claim to have fallen was right at a door, was it not? A. Right near the door; yes; just this side of that cess pool.

Q. Describe to the jury the character of that piece of ice. How large was it? A. I couldn't tell you that.

Q. You saw it, didn't you? A. The man swept them down the cess pool. Some was small and some was large. It wasn't as large as my fist or anything like that.

Q. Give us an idea of how large it was. A. Some of them were as large—

The Court. He is only asking about the ice you saw at the time you fell, before any was swept out.

The Witness. I never noticed the ice until I got up.

The Court. He wants to know how large the ice was that you saw, on which you say you fell.

The Witness. It was different sized pieces. They were
54 not all the same size; that is ice they chop off, you know; they use it on the fish.

Mr. Gray. I move to strike that as not responsive.

The Court. No; it is not responsive.

By Mr. Davis:

Q. You did not have any trouble to see it when you got up?

A. The man swept it down in the cess pool.

Q. You saw it before? A. I didn't pay any attention to it. I went there to buy fish.

Q. You did not look where you were going? A. I thought everything was all right.

Q. What did you buy from Stone? A. I didn't have time to get it.

Q. You did not buy anything, then? A. I didn't buy anything then, not after I fell; no.

Q. You claim to have been right badly injured. Were you unconscious or anything? A. No; I wasn't exactly unconscious.

Q. Did any body come to pick you up? A. No, sir.

Q. Did you get up of your own accord? A. I got up of my own accord.

Q. You walked out of the market? A. I had to go out. I went out and sat on the curbstone.

Q. Did Mr. Stone say anything? A. No; he was
55 cleaning fish and he had his back turned to me.

Q. Did you say anything to the market people at any time? A. No, sir; I never said a word to anybody.

Q. You did not bring this matter up with the market people or Mr. Stone until some time after it happened, did you? A. I don't know how long it was. I don't think I said anything to Mr. Stone about it.

Q. This picture that we have in evidence here has two doors closing in the middle? A. Yes.

Q. Is it not a fact that the door towards Stone's stand is always closed and kept closed? A. Practically, yes. I have noticed that myself.

Q. And people coming in or out of the market use this door (indicating)?

Mr. Gray. Which door?

Mr. Davis. The right one.

A. They don't come in that way. Some come in up here and out here (indicating).

By Mr. Davis:

Q. When they come in or go out they use this open door, do they not? A. Yes. Some goes out this way (indicating) and some through this other door. There is a door on the 7th Street side right at the end of this case.

Q. I want this made clear to the jury, Mr. Richards, please, sir. There are two doors? A. Yes, sir.

56 Mr. Davis. Two doors appear in this aisle where the gentleman claims to have been injured. Mr. Richards has testified that this door towards the stand is closed all the time.

By Mr. Davis:

Q. There is a bolt there. Did you see that there? A. Not all the time. In real hot weather they are both open.

Q. That door was open?

He has just testified that the right one was used by him.

How often have you been in that market? A. I have been in there a thousand times, I guess. I was born and raised in the Southeast.

Q. You did not have any trouble to see the ice when you got up, did you? A. When I first went up to the case to buy my fish I never noticed no ice. I never noticed it until I got up.

Q. Mr. Richards, you say you have been in the market a thousand times. I presume from that that you were in frequently before this accident happened, were you? A. I used to go there occasionally to buy fish.

Q. Did you ever see any ice on that floor before? A. I have.

Q. On what occasion? A. Oh, I couldn't tell you that. I never kept no track of that. I didn't take my pencil and paper around with me to put it down.

Q. You have seen ice there before? A. Yes; certainly. They use cracked ice.

57 Q. Who use cracked ice? A. Don't they use cracked ice there for their fish?

The Court. He is asking you.

The Witness. They used to. I dont know what they do now.

By Mr. Davis:

Q. Do you know—I withdraw that question. That is all.

Mr. Gray. May I ask one question that I neglected to ask, your Honor?

The Court. Yes.

George G. Richards, Plaintiff, on Cross Examination by Defendant District of Columbia

By Mr. Gray:

Q. Mr. Richards, you knew Mr. Apple, the marketmaster, did you not? A. The one that is there now?

Q. The one that was there then. A. No, sir.

Q. Did you have a conversation with Mr. Apple, the market-

master, on July 3, about your fall? A. No, sir. I have never spoke to the man the whole time I have been going to that market, the whole time he was there. I never knew his name.

Mr. Gray. That is all.

The Court. Is there any thing further with this witness? I think you had better finish with him before we take our recess.

George G. Richards, Plaintiff, on Re-direct Examination

By Mr. Wendell:

Q. Mr. Richards, can you tell how long a period of
58 time before you fell was the last time you were in the market? You said you went there occasionally before that time. How long before you fell was the last time you were in the market? A. After I broke my arm?

Q. No; before. A. I don't know how long it was before that. I used to go there every Saturday.

Mr. Wendell. That is all.

The Court. Is everybody through with him now?

Mr. Gray. Yes, your Honor.

The Court. We will take a recess until 1:30. Bear in mind the usual rule. Do not discuss this case among yourselves or with anybody else or let anybody discuss it with you.

(Whereupon, at 12:30 o'clock p.m., a recess was taken until 1:30 o'clock p. m. of the same day.)

* * * * *

93 John R. Stone, Defendant, on Direct Examination

By Mr. Davis:

Q. Mr. Stone, would you kindly state your full name, please? A. John R. Stone.

Q. Are you one of the defendants in this case? A. Supposed to be.

Q. Where are you doing business now? A. Eastern Market.

Q. Were you doing business there in 1936, July 2nd? A. Yes, sir.

Q. Been there ever since? A. Yes.

94 Q. What kind of a business do you run? A. Sea food.

Q. I show you a picture, Mr. Stone, and ask you if that identifies the place of business that you run? A. Absolutely. This over here was vacant (indicating).

Q. So that the jury may fully understand, you have this corner over here (indicating)? A. Yes, sir.

Q. This stall. How tall, Mr. Stone, is this stand at your place? A. Well, an ordinary man, it would come along about here (indicating). Of course we have boards in the back that raises up so we can look over it.

The Court. Of course the jury has to get that. Your answer "coming along about here."

Mr. Gray. Indicating about the middle of your chest.

The Witness. Yes, sir.

By the Court:

Q How tall are you, Mr. Stone? A. Five feet eleven and three-quarters.

By Mr. Davis:

Q. Mr. Stone, I ask you what entrance you have, or entrances to your stall. How do you get in there? A. One entrance. In here on the end (indicating).

Q. With reference to the points of the compass where is that, the north or south side? A. North.

Q. North side of your stand? A. North end of it, yes.

Q. And that entrance would be nearest to what door?
95 A. The Seventh Street door. Right by the Seventh Street door.

Q. There is a Seventh Street door over this way (indicating)? A. Yes, sir.

Q. And this is the C Street door (indicating)? Is that right?
A. Yes, sir.

By the Court:

Q. May I get that right? Which is the Seventh Street door? A. Here (indicating).

Q. The door we see is the C Street? A. Yes, sir.

By Mr. Davis:

Q. To get into your stall there is an aisle coming into the Seventh Street door. Would you mind coming down here so I can show them clearly? Stand up here.

(The witness approached the jury.)

A. Here is the entrance (indicating). The door was open because it was warm weather. This door here (indicating) is closed all the time. It is never open.

Q. This is the C Street entrance? A. Yes, sir.

Q. What entrance is this coming in from the Seventh Street side? A. This entrance right here (indicating)?

Q. Yes. Where is the door? You have to go around to near the Seventh Street entrance to get into your stand,
96 don't you? A. Yes.

Q. I think that explains the matter.

(The witness resumed the witness stand.)

By Mr. Davis:

Q. Mr. Stone, I want to get the condition here. What is this little place (indicating)? A. That is where the little drain is. Right at the edge of the stand.

The Court. What is that?

Mr. Davis. Little drain by the edge of the stand.

The Court. Better point it out to the jury.

A. That is the drain like they have all over the market, that is, different sections of the market.

By Mr. Davis:

Q. Now, Mr. Stone, the inside of that mark is used by you for what purpose (indicating)? A. Cleaning out the fish, washing the fish.

Q. What do you wash them in? A. There is a sink there like you would have in your home.

Q. Where is that located? A. There (indicating). There is another drain back there where the water goes.

Q. We want that understood thoroughly. A. The drain that is used is back in behind the counter there (indicating).

Q. Just point your finger directly to it. A. Here is
97 the front drain and the other is back in here in the corner (indicating). It all goes back here, because it is built that way. The water comes from that sink right down on that drain.

Q. And no water comes out on the aisle? A. No water comes out on the aisle.

Mr. Wendell. I object to the leading, that no water comes out on the aisle.

By Mr. Davis:

Q. Do you have anything in the southeast corner of your stand? A. That is where the fish are cleaned, that is where the sink is.

Q. Right in the corner? A. Right in the corner.

Q. Now, do you deal with ice in such a way as to put it in the aisles in any way? A. Of course not. All our stuff is handled in back of the cases. It has to be. You cannot work over that, it is too high.

Q. Do you open any fish any place other than within your own premises? A. No, I don't.

Q. How do you get merchandise within your stall there? Tell the jury exactly. A. There is an entrance from the alley and an entrance from Seventh Street, which is the closest to get in. These boxes are pulled in there and put in back of the counter. There is a storage box back of this (indicating). We work between the storage box and the selling counter. Most
of the stuff is put in in here.

98 By the Court:

Q. Which door does it come through? A. The

Seventh Street door principally.

99 By Mr. Davis:

Q. At any time, Mr. Stone, have you had a habit of bringing in your provisions at all through the C Street door?

A. No, sir.

Q. I will ask you if you had a helper or anybody working for you on the day Mr. Richards claims to have fallen? A. That afternoon there was no one there but me, sir.

Q. There was nobody there helping you at all? A. No.

Q. Mr. Richards testified that at the time he fell you were in the corner with your back to him. A. I was. If he fell at all.

Q. Have you ever seen any water in that aisle about the time he was injured. or any ice? A. No, sir.

Q. Mr. Stone, did you ever put any ice there, or water? A. No, sir.

Q. Or cause any to be put there? A. No.

Mr. Gray. He shook his head for no.

Mr. Wendell. I object to that.

The Court. I don't think that criticism is justified. If you want to say no you can shake your head but say no so we can both hear and see.

By Mr. Davis:

Q. What is your principal business day of the week? A. Friday, of course.

Q. What time do you bring your merchandise in for display?

A. Well, I usually get back from the wholesale department about—on Friday about seven, seven-fifteen.

100

Q. P. M. or A. M.? A. A. M.

Q. Then I understand from you that you bring your fish and crabs and sea food in in the mornings, real early? A. Yes, sir.

Q. Now, what is your practice with reference to getting your merchandise open? A. We get to work on that just as quick as possible, as soon as we get them in; that is the main thing to do, get your fish on sale.

Q. And on ordinary days the average practice is to get your display counters filled with your goods about what time of day? A. Usually on a Friday morning it is about 8:00 o'clock before we can get it finished, sometimes 8:30.

Q. Mr. Richards testified that he came in the market on the Seventh Street side, walked in front of your place about 3:00 o'clock in the afternoon. Would you have any occasion to use ice or to have any of it around your place at that time?

A. No, sir.

Q. And you have testified I believe that you didn't put it or cause any ice to be put in that aisle.

Mr. Wendell. I object to what he has testified. The jury knows what he has testified to. I think we are trying to lead up to a leading question.

By Mr. Davis:

Q. I want the jury to understand, Mr. Stone, whether ice was put there at your instance or not. Will you answer
101 that question? A. There was no ice put there that I know of or had anything to do with.

Q. Now, Mr. Wendell said a lot about this trap being clogged up. Tell us about the condition of that. A. That trap has never been clogged up, never been in an unsanitary condition, at all, because we watch very closely, especially in the summer-time. If we didn't keep it clean—

Mr. Wendell. I object to that as being argumentative, your Honor.

The Court. I guess that is so.

Mr. Davis. I will have that stricken, that last statement.

By Mr. Davis:

Q. You have dealings with the marketmaster there, don't you? Does he come around to see you about anything? A. Very seldom.

The Court. What was the answer?

Mr. Davis. Very seldom.

The Witness. May I add a statement to that?

Mr. Gray. Mr. Davis.

Mr. Davis. Excuse me.

(There followed a whispered conference between counsel.)

(The question and answer were read by the reporter.)

By Mr. Davis:

Q. Were you given any instructions by the marketmaster?

Mr. Wendell. I object to it as being leading.

The Court. What do you mean, when he began to operate the stall there?

102 Mr. Davis. I withdraw that question.

By Mr. Davis:

Q. Mr. Stone, so far as you know, you have always kept your place in what kind of condition? A. The proper condition, sir.

Mr. Wendell. I object to that, proper condition; I think it is argumentative.

The Court. The question is about the presence of ice.

Mr. Wendell. That day.

The Court. Directly in front of his store.

By Mr. Davis:

Q. It has been testified here that a helper came out from behind a stall somewhere, I believe they identified it as yours, and swept some ice and cleaned out this trap. A. At the time this man is supposed to have fallen?

Q. Yes. A. Absolutely nobody. No one there but me.

Q. Did you see the man fall? A. No, sir.

Q. Did he communicate with you or say anything to you about it? A. No, sir.

Q. When did you hear from it first? A. You mean when did I hear that he had hurt himself first?

Q. Yes. A. I think there was talk the next day about it, him coming in to see the marketmaster.

103 Q. He didn't say anything to you at the time? A. No, sir.

Q. Did he buy anything from you that day? A. No, sir.

Q. He went on out of the market when he was injured?

A. Yes, sir, when he was supposed to be.

Q. That's all.

John R. Stone, Defendant, on Cross Examination

By Mr. Wendell:

Q. You had a man named Shamanski, did you not? A. He usually helped me on a Friday.

Q. Isn't it a fact that John Shamanski was working there that day? A. He was not. If he was it was in the morning, because I was alone when this happened.

Q. I see. What is Shamanski's first name? A. John.

Q. And he worked for you how long a period of time before this happened? A. I couldn't tell you that. He worked for the railroad company and he got off Fridays and helped me. He got off one day a week, on a Friday, and came to help me.

Q. And he worked from early morning until the shop closed at night, six o'clock at night. How long did Shamanski keep working for you after this happened? A. I do not know, sir. I don't remember.

Q. Now, you have drain in front of your stand. There is a drain in front of your stand, is there not? A. It shows it right there (indicating).

104 Q. For the purpose of draining water away from your stand? A. No, sir, That is the aisle drain.

Q. Isn't it a fact there is no other drain around here? You control this stand, the vacant stand? (indicating) A. I do now, yes.

Q. And there was no ice at the stand which was vacant? A. No, sir.

Q. And these other stands were cake stands, there was no ice there? A. Yes, sir.

Q. And wasn't that drain there for the purpose of serving your stand? A. I do not know, sir.

Mr. Davis. I object.

The Court. It doesn't amount to anything. Still, I sustain the objection.

By Mr. Wendell:

Q. Isn't it a fact that one of the places where the water from your stand drained was this trap right there? (indicating) A. The water that I use?

Q. From your stand, yes. A. I told you the water I used and from my stand goes into the other drain.

By the Court:

Q. You mean to say that none of the water from your stand does go into this drain in the aisle? A. It is possible it could be done, yes, if there was too much of it. If anyone
105 would throw any water down it would go into that drain.

By Mr. Wendell:

Q. But doesn't the water from your stand drain down that way? A. It drains the other way.

Q. Doesn't it drain down this way and over this way? (Indicating) A. It drains next to the corner.

Q. Isn't there a depression there (indicating)? A. From the aisle, yes.

Q. And isn't that depression lower than where your stand is? Isn't that depression lower than your stand is?

The Court. Does that wide mark mean anything on that picture?

Mr. Wendell. Well, the trap is up in there.

The Court. What is it? Sun-light?

Mr. Wendell. Yes.

The Court. It hasn't any concern with this?

Mr. Wendell. No. I am pointing to the trap up in this corner.

By Mr. Wendell:

Q. Now, there is a space underneath your stand? A. A little space.

Q. Well, it runs all the way through, doesn't it, clear under your stand? A. Yes, sir.

Q. And if any ice back of your stand were dropped it could go right through, clear into the aisle? A. There would be no chance of any ice going through there. We would have
106 to throw it very far back and use it very recklessly for any ice to get through there.

Q. Have you got your payrolls for 1936? A. No, sir.

Q. You have not. Did you carry social security on the men who worked there in 1936? A. No. They just came in on a Friday.

Q. Did you carry social security for that purpose?

Mr. Davis. I object to that.

The Court. I don't know what the law is on that. You can ask what the fact was.

The Witness. This man was working for the railroad company and came there on a Friday to help me.

By Mr. Wendell:

Q. I understood you to say that he worked there from early in the mornings on Fridays. A. On Fridays.

Q. Did you carry social security on that man? A. No.

Q. Now, you said in response to a question here as I understand that practically all the time you came through the Seventh Street entrance with your merchandise. A. Principally.

Q. Some of the time you came into this door, didn't you? (indicating) A. No, I came either the alley entrance or the Seventh Street. Why should I go way back out of my way?

Q. Why do you say principally you came in the other entrance? A. I do, yes. But there is another entrance in
107 the alley. When we go back in the alley to unload, why, we come in that side.

Q. That's all.

Mr. Davis. I have no questions.

Mr. Gray. I have no questions.

A Juror. May I ask some questions?

The Court. Yes.

By a Juror:

Q. In what manner does your sea food arrive? A. It usually comes in boxes, sometimes we have it in baskets.

Q. It is iced? A. Yes.

Q. It is drawn from the Seventh Street side back of the counter? A. Yes. And don't go around the counter at all.

Q. They are opened back of the counter? A. Yes.

Q. Your showcase where your customers come in to make purchases, is that completely closed? A. It is all closed except the slide doors in the back. No one can touch anything at all. It was formerly a meat counter and just the slide doors in front of it, is all that can get in there.

By Mr. Wendell:

Q. But you unload the iced packages or iced boxes back of the counter, don't you? A. Yes, sir.

Q. And back of the counter where you unload them
108 there is a space going clear from back of the counter up
to the front, underneath there? A. Yes, sir. That has
nothing to do with the ice.

(The witness left the stand.)

The Court. I think we are arranging, ladies and gentlemen, to let you go out and go to market this afternoon.

When you go there look just as much as you want to, but no testimony will be given, nobody will testify in front of you. You look around and see just as much as you want to.

Now, is the bus here?

The Deputy Marshal. The bus will not arrive until 3:15.

The Court. Well, can you call a witness?

Mr. Gray. I can call a witness, your Honor.

The Court. All right.

I don't know whether you ladies and gentlemen have automobiles here or not. Do any of you come by car?

A Juror. I have a car.

The Court. Is it convenient for you to come back here or do you prefer to leave from there? That is Seventh and C Streets.

They will have to come back here to get the cars unless they drive over.

109 Joseph C. Elbert, Witness of Defendant, District of Columbia, on Direct Examination

By Mr. Gray:

Q. Your full name, please, Mr. Elbert? A. Joseph C. Elbert.

Q. You are a little hard of hearing, are you not? A. Yes, sir.

Q. How are you employed, Mr. Elbert? A. Computing engineer. Highway Department, District of Columbia.

Q. And you are a civil engineer, are you not? Yes, sir.

Q. How long have you been so employed by the District? A. For 30 years or so.

Q. Is it part of your duty to make maps and plats for use in court? A. Yes, sir.

Q. I hand you a plat and ask you if you made it. A. Yes, sir.

Q. Now, will you state where you got the data from which you made that? A. It was made on the ground.

Q. How did you make your measurements? A. Made the measurements with a steel tape and an engineer's level.

Q. Now, will you stand down here with that map in front of the jury, Mr. Elbert?

(The witness stood down.)

Mr. Gray. I offer this in evidence, if the Court please.

The Court. All right. It will be received.

110 (The plat was marked District of Columbia Exhibit No. 2, and received in evidence.)

By Mr. Gray:

Q. Now, what do these red lines down here indicate? (indicating). A. Boundary of Eastern Market.

Q. Now, I call your attention to this mark around here that is marked "Step." Where is that step located? A. That is the step on the C Street entrance of the Eastern Market.

Q. How many steps lead into the door on C Street? A. There is a platform and then one step up.

Q. Now, on the Seventh Street side, how many steps are there? A. Only a doorsill.

Q. Only a doorsill? A. Yes, sir. One step up from the street there is a door sill.

Q. And then you are flush with the market, is that it? A. Yes, sir.

Q. Now, I call your attention to these blue lines here and ask you if that is Mr. Stone's fish stand. A. That is Mr. Stone's stand.

Q. I call your attention to two black marks here (indicating) and ask you what they represent. A. Drains.

Q. Now, did you note the elevation of the floor of the market? A. Yes.

111 Q. Will you describe to the jury what you found the elevations to be along the aisle in front of Mr. Stone's stand? A. Starting from the center line—

Q. Swing around a little bit, please. A. Starting from the center line, east and west aisle and the north and south aisle, the elevation is 100.79, and for a distance—

112 Mr. Gray. Well, let's put it upon the board.
(The plat was pinned to the blackboard.)

A. Starting from the center line of this sketch—

By Mr. Gray:

Q. Step on the other side, please. A. (Continuing)—of the east and west aisle from Seventh Street, north and south aisle leading over from C Street, at the intersection of those two aisles, the elevation is 100.79.

And going from that point in a southerly direction still on center line of the aisle of C Street for a distance of 12.8 feet the elevation is 100.73 which makes a grade falling southward.

And from elevation of 100.73 still going southward for a distance of 1.7 feet the elevation is 100.71.

Q. Before you go any further, what is the difference in inches between this first point where it is 100.79 and the second point where it is 100.73? A. Six-hundredths part of a foot.

Now from the point of 100.73 to the point 100.71 the distance between would be 1.7 feet. The difference in elevation is .02. And then from point of elevation 100.71 to point 100.69 it is a foot and a half south of elevation 100.71. It is .02 difference in elevation, quarter of an inch. Then from the point 100.69 to the north end of the door sill the elevation is 100.64 for a distance of two feet, and that is five-eighths of an inch.

Q. Now what is the elevation of this drain out in the aisle with respect to the center line of C Street? A. 100.68.
113 Q. What is the difference between that and the elevation at the center aisle? A. Elevation from the aisle—

Q. I mean center line of this C Street aisle going north and south. A. Starting at the point of beginning there is a difference of .11, that is $1\frac{3}{8}$ inch.

Q. From your description of the elevation at the intersection of the Seventh Street aisle to the C Street aisle, to the drain. A. It would be .2. I think I said a different elevation before, but it is .2. That is 100.79 and the drain is 100.59.

Q. How much is that in inches? A. That is $2\frac{3}{8}$ inches.

Q. Did you get the elevation then of Mr. Stone's stand? A. Right opposite the drain, this drain here (indicating)—

Q. That is, the drain in the aisle? A. Yes. The elevation in the center between the two show cases—or, the show case and the fish container, is 100.63. That falls toward the drain .04, of an inch.

Q. Toward which drain, Mr. Elbert, the one in the aisle? A. In the aisle, yes, sir.

Q. Now is there any drainage toward the trap inside of Mr. Stone's stand? A. On this drain here—(indicating).

Q. Referring now to the one inside the stand. A. It was in such a position that we couldn't make elevations on it.

114 By a Juror:

Q. Couldn't what?

The Court. I am afraid I didn't get it straight. Does the ground drain from the center point to the stall? I didn't understand whether the water drained toward the aisle, that is, the walkway, or whether it drained toward the center.

By Mr. Gray:

Q. Which way does the water drain, towards the aisle or towards the center of this stand? A. The water here drained into the C Street aisle (indicating).

Q. We are not talking about water inside the fish stand. Did you say water inside of the fish stand would drain toward the trap in the aisle? A. Yes, sir.

Q. But you cannot tell about the elevation inside the stand? A. No. There is a pipe coming out, the water just drops into that drain.

Mr. Gray. You may inquire, Mr. Wendell.

**Joseph C. Elbert, Witness of Defendant, District of Columbia,
on Cross Examination**

Mr. Wendell. I haven't a single question in the world.

The Deputy Marshal. The busses are here.

The Court. We will take our adjournment at this time and the jurors will go with the Deputy Marshal to this place. Unless those who have cars would rather drive.

(Thereupon at 3:15 o'clock p. m. an adjournment was taken until tomorrow, Wednesday, October 30, 1940, at 10 o'clock a. m.)

* * * * *

117 Joseph C. Elbert, Witness of Defendant, District of Columbia, on Re-direct Examination

By Mr. Gray:

Q. Mr. Elbert, when you were on the stand yesterday you testified that you had not been able to get the elevation of the drain inside of Mr. Stone's stand; is that correct? A. Yes.

Q. Now, were you over to the market yesterday afternoon? A. Yes.

Q. Will you state to the ladies and gentlemen of the jury what was done after the jury left the market? A. After the jury left some wooden floor in the rear of the stand was removed and Mr. Stone then took a hammer and knocked it in order to get the elevation.

Q. Did you then make a survey in order to get the elevation of the drain behind the stand? A. Yes.

Q. Have you made a plat to show that? A. Yes.

Q. Come down to the jury and explain that to the jury. Which one of the drains is the one on the aisle? A. (indicating).

118 Q. This is the one out in the aisle? A. Yes.

Q. What was the elevation of these two drains? A. The elevation is 1 foot .69 for a distance of 2.18 feet east of the standing of the drain leaving 1.68.

Q. What is the difference in inches of these two elevations in the aisle? A. To a point 2.18 feet eastward, in toward the stand the elevation of the drain is 100.59 on the elevation of the point, that is, 2.18 feet east is 100.68 feet, making a difference of .09.

Q. In other words, the further in you go from the stand the higher it gets; is that true? A. Well, I started to get down a certain point.

Q. Where did you start to go down?

By the Court:

Q. I dont understand whether the slope is down toward the aisle or whether it is down from the aisle toward the street.

By Mr. Gray:

Q. Which way does the slope go, down from the aisle or from the stand? A. The first distance of 2.18 feet from the center of the drain to a point whose elevation is 100.68, it slopes from the drain in the aisle.

Q. Now tell us from that point. A. From that point, from a point 168 and 115 feet eastward, the elevation is level from both 100.68, then the next 1.87 feet eastward it slopes toward the drain inside the stand and that elevation is 100.66, a difference of .02 or a quarter of an inch; and then from an elevation of 100.66 to a distance of 2.27 feet to the center of the inside drain, to the elevation of the inside drain it is 100.57.

Q. Now, which one of these two drains is the lower? A. The inside one.

Q. Where is the high point of the floor between these two drains? A. The high point is about here (indicating). It is a level stretch right in here.

Q. Now, can you tell by reference to both these stands where the show case that abuts on the aisle would come with reference to the elevation floor. A. The show case starts right here (indicating) and ends right here (indicating).

Q. Can you scale this? A. You have the distance, 115 and 218 feet. 333.

Q. Does that come to the end of the show case or to the center of the door? A. The center of the drain to the end of the show case.

Q. Do you mean now that the edge of the drain, the eastern edge of the drain in the aisle is flush with the edge?

Mr. Wendell. I object to the question as leading.

The Court. I overrule the objection.

By Mr. Gray:

Q. Do you mean that the eastern edge of the drain in the

aisle is flush with the westerly edge of the show case? A. Yes.

By the Court:

Q. What do you mean by flush?

120 By Mr. Gray:

Q. Is it on the line, is the outside edge of the show case on that line with the inside edge of the drain in the aisle?

A. Yes, sir.

Mr. Gray. Does any member of the jury have any question about that?

By a Juror:

Q. Where Mr. Elbert said about the higher point. Do we understand that the higher elevation is between these two points (indicating)? A. These two points are level (indicating).

Q. Which way does that slope? A. It slopes toward the drain.

Q. Outside the drain? A. Yes.

By Mr. Gray:

Q. And the other side slopes which way? A. And the other side slopes this way (indicating).

**Joseph C. Elbert, Witness of Defendant, District of Columbia,
on Re-cross Examination**

By Mr. Wendell:

Q. Have you got a map that you had here yesterday? A. Yes.

Q. Didn't you testify yesterday that the floor was built so that it sloped to the outside drain of the aisle? A. No, I mean the slope of this floor and then the drain from there into this point (indicating).

Q. Do you mean the inside? A. Yes, because I could take only one level.

121 Mr. Wendell. That is all.

By Mr. Davis:

Q. Mr. Elbert, there is one matter that I want to clarify in my mind and for the jury. That is about the two drains, one outside and one inside. A. Yes, sir.

Q. You say water flowing inside from a certain distance will go into the inside drain?

Mr. Wendell. He hasn't said that at all.

The Court. Yes, he said that. I overrule the objection.

By Mr. Davis:

Q. Would you tell the ladies and gentlemen of the jury just how far in feet or inches from that inside drain, water will drain into the inside drain, if you can? A. 4.14 feet.

Q. Now I understood that a drop of water falling within 4.14 feet of it, within the drain, will go into the inside drain?

A. Yes, sir.

Mr. Davis. That is all.

Mr. Wendell. No further questions.

(The witness left the stand.)

Mr. Gray. May Mr. Elbert be excused, your Honor?

The Court. Yes.

122 **Edmond A. Peake, Witness for Defendant, District of
Columbia on Direct Examination**

122 By Mr. Gray:

Q. Mr. Peake, what is your business or occupation?

A. I am in the meat business in the Eastern Market.

Q. How long have you been in the Eastern Market? A. I have been in business for myself about twenty years but I have been in the market more than thirty years.

Q. You were employed there before you went into business for yourself? A. Yes.

Q. Now, Mr. Peake, are you familiar with the location of Mr. Stone's stand in the market? A. What is that?

Q. Are you familiar with the location of Mr. Stone's fish stand in the market? A. Yes, sir.

Q. Will you say whether or not you had occasion to go past that fish stand? A. Yes, sir, I have.

Q. Will you state whether or not during the time that you have been in the market you have ever noticed any ice, water, or any defective or dangerous condition of the aisle in front of Mr. Stone's fish stand?

Mr. Wendell. I object to the question as calling for a conclusion.

The Court. I think it is calling for conclusion. I think you better ask him the first part.

By Mr. Gray:

Q. Mr. Peake, during the years that you have been
123 in the market, have you ever noticed an accumulation
or any water or any ice in the aisle in front of Mr.
Stone's fish stand? A. No, sir.

Mr. Wendell. I object unless he shows that this was on July 2nd.

The Witness. No, sir.

The Court. I overrule the objection.

By Mr. Gray:

Q. What was your answer, Mr. Peake? A. No, sir.

Mr. Gray. You may inquire.

**Edmond A. Peake, Witness for Defendant, District of Columbia,
on Cross Examination**

By Mr. Wendell:

Q. Where is your stand? A. About the southern part of the Eastern Market, on the west side of the Eastern Market.

Q. On a different side from Mr. Stone's stand altogether?
A. Yes.

Q. And his is in the southeast corner? A. Mine is in the southern part on the west side.

Q. And his is in the southeast corner? A. Yes, sir.

Q. Were you by his stand on the 30th day of June, 1936? A. I can't say that.

Q. Were you by his stand on the 30th day of July, 1936?

A. I went past the stand several times a day.

Q. Were you past the stand on the 30th of June, 1936? A. I can't say that.

124 Q. Were you past the stand on the 1st of July, 1936?

A. I can't say that.

Q. The second of July, 1936? A. I couldn't tell you.

Q. The third of July? A. I am not sure. I went past there almost every day,—

Mr. Wendell. Now wait a minute.

Mr. Gray. Now I think he is entitled to answer.

By Mr. Wendell:

Q. I am asking you whether on these days, whether you were by the stand? A. I can't say that.

Q. Were you by the stand on July 30th? A. I can't recall dates.

Q. How about the 3rd of July, 1936? A. I still can't recall the date.

The Court. If there are any explanations that you want to make you may make them at this time.

The Witness. I can say at this time that there is never a day that I didn't pass back and forth in front or near the stand of Mr. Stone. Any day of the week. I passed there numerous times during the day. My business calls me to go back and forth at times and I pass there every day in the business year.

Q. If you have no business you don't go back there? A. I have business to go past there or close to the stand every day.

Q. And is your stand on the other side of the market? A. Yes.

Q. Why did you have occasion to pass the stand?

125 A. I had to get my provisions near there.

Q. You got your provisions on the other side of the market? A. Sometimes.

Q. As a general rule you do, don't you? A. Sometimes, and sometimes I don't.

Mr. Wendell. That is all.

Mr. Gray. May Mr. Peake be excused, your Honor?

The Court. Yes.

(The witness left the stand.)

Mr. Gray. If your Honor please, I have quite a number of people who were subpoenaed. I want to find out if some of them are here.

The Court. That is all right.

Mr. Gray. Please call Mr. Hartman.

**John W. Hartman, Witness for Defendant, John R. Stone, on
Direct Examination**

By Mr. Davis:

Q. Mr. Hartman, for the benefit of the jury will you kindly state your full name so that they may hear you? A. John W. Hartman.

Q. Mr. Hartman, do you know this gentleman here whom I am point out to you? A. Yes, sir, Mr. Stone.

126 Q. Do you know where he does business? A. Yes, sir; in the Eastern Market.

Q. Have you ever been in that market? A. I have been going in the market for a number of years, about, I would say, anywhere from one to three times a week.

Q. Did you go in there around July, 1936?

Mr. Wendell. I object to the question as leading.

The Court. The objection is overruled.

The Witness. That is so far back I can't say positive right at that time, but I have been going in there.

By Mr. Gray:

Q. Since you have been going in there have you ever noticed any ice or any matter on the floor that would cause a dangerous condition?

Mr. Wendell. I object.

The Court. That calls for a conclusion.

By Mr. Davis:

Q. Did you, in your visits to that market, ever see anything on the aisle in front of Mr. Stone's stand? A. No, sir, I haven't.

Q. Will you state the condition in which you saw these aisles whenever you went in there?

Mr. Wendell. I object. We are not interested in now. We are interested in the month of July, 1936; July 2, 1936.

The Court. I will sustain the objection.

Mr. Davis. That is all.

Mr. Gray. One moment, please. Have you any questions, Mr. Wendell?

Mr. Wendell. No.

(The witness left the stand.)

**127 Wilbur M. Barrows, Witness for Defendant, District of
Columbia, on Direct Examination**

By Mr. Gray:

Q. Are you in business in the Eastern Market? A. Yes.

Q. What business are you in? A. Dairy products.

Q. Are you familiar with the location of Mr. Stone's fish stand, the Eastern Sea Food Company? A. I am.

Q. In the course of your business, do you have occasion to pass Mr. Stone's fish stand during the day? A. Quite frequently.

Mr. Wendell. How long has he been in business?

By Mr. Gray:

Q. How long have you been in business there? A. Nine years.

Q. Will you state whether or not you have ever seen an accumulation of ice or water or any ice or water in front of Mr. Stone's stand, particularly in the neighborhood of July, 1936? Can you fix that date in your mind? Do you understand the question? A. I couldn't remember that year or anything like that, but the floors around there are always perfect.

Mr. Wendell. If he can't remember the year I move
128 that the answer go out.

The Court. I overrule the motion.

Mr. Gray. You may inquire.

**Wilbur M. Barrows, Witness for Defendant, District of Columbia,
on Cross Examination**

By Mr. Wendell:

Q. You say you don't remember that time back in 1936, July? A. No, sir. Not that day.

Mr. Wendell. That is all.

Mr. Gray. May Mr. Barrows be excused, your Honor?

The Court. Yes.

Each witness may be excused unless the other side requests that they be retained for further examination.

(The witness left the stand.)

**George P. Castell, Witness for Defendant, District of Columbia,
on Direct Examination**

By Mr. Gray:

Q. Let us have your full name, please. A. George P. Castell.

Q. Do you have any business in the Eastern Market? A. Yes.

Q. What kind of business? A. Meats.

Q. Are you familiar with the location and stand of
129 Mr. Stone, the Eastern Sea Food Company? A. Yes.

Q. In the course of your business do you have occasion during the day to go past Mr. Stone's stand?

Mr. Wendell. I object to the question as leading. It is plainly leading.

The Court. The objection is overruled.

Mr. Wendell. May the Court allow me an exception?

The Court. Yes.

The Witness. At times, yes.

By Mr. Gray:

Q. Will you state whether or not you have ever noticed any accumulation of ice or water or any ice—

By the Court:

Q. How long have you been there in the market? A. Well, about three generations.

By Mr. Gray:

Q. You mean your grandfather and your father and now you have been in business there?

By the Court:

Q. You don't want to cover that whole period, do you? A. No, sir.

The Court. I suppose he was there on July 2, 1936.

By Mr. Gray:

Q. I direct your attention to the period about July, 1936.

The Court. What has happened since then wouldn't help us.

By Mr. Gray:

Q. Prior to July, 1936, or prior to July 2, 1936, will
130 you state whether or not you have ever noticed any accumulation of ice or water or any ice and water standing in the aisle in front of Mr. Stone's fish stand? A. Personally I

have never in my knowledge seen any accumulation of ice there.

By the Court:

Q. The question was, did you see any ice. A. No.

**George P. Castell, Witness for Defendant, District of Columbia,
on Cross Examination**

By Mr. Wendell:

Q. You say you went back there occasionally? A. Yes.

Q. About once a month? A. Oh, yes.

Q. Would you go twice a month or once a month? A. Maybe twice a month.

Q. Your stand is in another part of the market? A. Yes. Mine is in the center and his is on the end.

Q. Do you know whether or not you went back there on July 2, 1936? A. No, I couldn't swear to that.

Mr. Wendell. Thank you. That is all.

(The witness left the stand.)

**131 John C. Schymansky, Witness for Defendant, John R. Stone,
on Direct Examination**

By Mr. Davis:

Q. Will you state your full name for the benefit of the jury?

A. John C. Schymansky.

Q. Have you ever worked for Mr. Stone, John R. Stone, in the Eastern Market? A. I did.

Q. Do you see him here in Court? A. I do.

Q. What time did you work for him? A. I did work for him full time, no, just an extra, part time.

Q. What did that part time constitute? How many times a week? A. Particularly Friday.

Q. Do you know this gentleman sitting here? A. I have seen him quite a few times.

Q. Did you ever see this gentleman fall in the Eastern Market? A. No, sir.

Q. Was the matter of this gentleman's falling ever called to your attention by anybody? A. Oh, yes, on the Friday, the same day—the day after it happened, he was in the market and was talking to me and Mr. Stone.

The day after it happened? A. Yes.

132 Q. And to Mr. Stone? A. Yes.

Q. But you weren't there the day it happened, is that your testimony? A. That is to my best knowledge, yes.

Q. Well, did there ever come a time when you came out of Mr. Stone's stand and swept up the ice and took the lid off the trap and cleaned it out, about the time somebody was injured? A. Well, usually we used to clean the place up every day when I was working in front of the stand.

Q. What is that? A. Quite often we cleaned the stand.

Q. You cleaned the water out and so forth? A. Yes. Swept up around there, the different things.

Q. Was there ever any ice on the outside of the lid at about C Street? A. Well, yes, at times there could have been.

Q. Where would that come from? A. From the C Street entrance right over the sewer trap where the ice would be brought sometimes, and dumped into the barrel.

Q. Where did Mr. Stone clean his fish? A. Mr. Stone cleaned the fish behind the ice box, around the wall.

Q. Was there a drain there? A. Yes.

Q. Where is the water drain? Give me that picture, please.

Do you recognize this as Mr. Stone's stand? A. I do.

133 Q. Where are the traps in that place? A. One trap here (indicating) and another trap back here (indicating).

The Court. I suggest that you stand in front of the jury.

The Witness. In this place here (indicating) is a trap. That is on the other side of the stand. It is right in the corner. This is the trap as you come in off C Street. This (indicating) is the outside of the stand in the corner. Back here (indicating)

where you can't see is where we clean the fish out. There is a trap right in there that you can't see from the picture.

By a Juror:

Q. Where is the barrel in which they put the ice? A. It would be here (indicating).

Q. That is the outside stand?

By Mr. Davis:

Q. Outside the stand. A. Yes.

Q. In the aisle? A. Yes.

Mr. Wendell. He has testified to that.

The Witness. The barrel would be rolled out of the door and set right here in this corner.

By Mr. Davis:

Q. You weren't there the day this man fell? A. I can't recall.

Q. You didn't sweep up anything the date that he fell?

Mr. Wendell. I object. He said he swept from time to time, as being a leading question.

By Mr. Davis:

Q. You didn't come out there on that day and sweep
134 up anything because this man fell? A. No.

You are positive of that? A. No.

Mr. Davis. That is all.

**John C. Schymansky, Witness for Defendant, John R. Stone, on
Cross Examination**

By Mr. Wendell:

Q. Mr. Schymansky, you did come out and sweep from time to time? A. Yes.

Q. You swept the ice and water in the aisle? A. Yes.

Q. And cleaned up the top of the trap? A. Yes.

Q. And swept the ice down in there? A. Yes.

Q. Now you spoke about working on Friday? A. Yes.

Q. Isn't it a matter of fact—Did you carry social security at that time? A. I have been carrying social security ever since it came out.

Q. You carried social security. Isn't it a fact that during the month of July, 1936, you worked practically every day during that month? A. I was working nights for the Washington Terminal Company and then came to Mr. Stone and worked part time.

Q. In July you worked practically the whole month,
135 1936? A. Yes.

By the Court:

Q. How long did you work there? A. Sometimes I came in at ten or eleven o'clock until four or five o'clock.

* * * * *

147 Q. Now, you say you talked to Mr. Stone yesterday about this case? A. He came down and talked to me about the case.

Q. When you cleaned out the trap, what do you mean? A. Why, water would drop down from the case and some of it leaked in there. Sometimes we would have sawdust in the front and we swept it around there.

By the Court:

Q. Is that what you mean? A. Yes.

By Mr. Wendell:

Q. Now, in other words, the trap became clogged up and had to be cleaned out? A. Yes.

Q. So that the water could drain down? A. Yes.

Q. Isn't it a fact that on the second day of July, 1936, that after Mr. Richards fell, you went around and swept ice and

cleaned up the drain around there? A. I couldn't say that for sure.

148 Q. You are not sure about that? A. No, sir.

Q. You may have done so? A. I probably could not and maybe could have.

By a Juror:

Q. From your knowledge do you know whether anybody could have swept the ice and water from in front of the stand?

The Court. You mean his personal knowledge.

The Witness. On this particular day there wouldn't be any colored boy there.

By Mr. Gray:

Q. On any other day would there be an occasion to use a broom to sweep the ice or water? A. Yes.

By a Juror:

Q. May I see that photograph for just a minute? I believe that you said that there was a barrel placed there? A. You see this corner right here? The barrel would be here and ice would be brought in this door (indicating) to this barrel in this corner (indicating) right by the door.

By the Court:

Q. Over the trap? A. Yes, over the trap.

Q. Who put ice in there? A. An ice man himself.

Q. At what time? A. Some time about ten in the morning. some time at one or two in the afternoon.

By a Juror:

149 Q. When was the barrel removed? A. It wasn't removed at all until the evening.

Q. When the fish would be brought into the market what entrance would it come in from? A. On this side (indicating). That is on the Seventh Street side.

Q. When the fish would be brought in would it be put under

the stand or in the container? A. No, we had too many fish. We would have to put them under the stand.

Q. With fish and ice in there? A. Yes. Under this case on the front of this case—on the back of this case.

Q. Did you ever put any fish in from this door there? A. Yes. We would take one of those little hand scoops because the barrel couldn't pass through. We couldn't use all this ice on the fish because we had the fish showing so that people could see the fish, and we couldn't use all the ice at one time.

Q. Is that the same case? A. That is the same case.

Q. With that high case over it? A. The scoop of ice over it on the opposite side slips over it.

Q. You scoop ice over it? A. Yes.

Q. The ice in the barrel on the aisle never rolled around? A. Yes. Late in the afternoon when we were finished we would take all the ice out of the particular barrel, we would take what ice there was there and roll it around and finish up
150 the ice in the case.

By Mr. Gray:

Q. What ice man brought the ice? A. I think Mr. Paul Frederick.

Q. How do you spell it? A. I don't know.

Q. Now, was there sawdust on the aisle on July 2nd? A. I don't think so.

Q. I understood you to say that what you meant by this drain being clogged up is that when there was sawdust on the aisle that would be preventing the water from going down the drain? A. Yes.

Q. Was there any paper in the aisle on that day? A. I can't recall.

Q. When Mr. Stone told you about this man being hurt did you go out and look at anything to see whether or not there was a condition to make you fall? A. Right at the moment I can't recall. There was nobody there but Mr. Stone and myself.

Q. When this conversation took place on July 2nd, that was during the lull in the business, wasn't it? A. No, the Thursday afternoon was a busy afternoon. We had lots of fish and ice to put away.

By a Juror:

Q. Would most of that fish come in on Thursday afternoon or Friday or Friday morning? A. Mostly on Thursday afternoon.

Q. And you would put the fish away for the Friday
151 business? A. Yes, unless we had some fish on Friday morning.

Q. You got most of it on Thursday? A. Yes.

Q. May I ask a question? The barrel may have been there (indicating). How far would you think that water and ice would be extending this way (indicating) from the barrel?

Mr. Gray. North.

The Witness. It wouldn't extend only, just right around the barrel.

Q. How far had or do you think it would be wet? A. I would say about a foot or a foot and a half.

By Mr. Gray:

Q. For a foot from where? A. From the case.

By the Court:

Q. From the show case? A. Yes. Especially to the side not quite covering all this. You couldn't get right here against the case.

Q. How big was that barrel? A. A regular sugar barrel . about two and a half bushels.

Q. Tell me what you mean by cleaning that trap? A. Just taking a broom and cleaning it.

Q. Would you take the lid off in cleaning the trap? A. No. It was one of these big traps and it had slits in it. It wasn't a little round hole.

Q. Did you ever lift it up to clean it out? A. No, not this particular one.

152 By Mr. Wendell:

Q. Now, you testified that sometimes sawdust and paper got into the slits of that trap? A. Yes.

Q. Did you take the lid off and clean it out? A. No, I didn't do that.

Q. Did paper and sawdust get in there? A. Yes, but the water would wash it down.

Q. If the water didn't wash it out, you would clean the holes out? A. Yes.

Mr. Wendell. That is all.

By Mr. Davis:

Q. When you say that it was cleaned out you don't mean that water wouldn't run down in it? A. No, sir. It would.

Q. It would run down in it at all times? A. Yes, because it was like a sewer trap.

Q. Showing you that door right by that place where the barrel is located, what was the custom there with reference to leaving these doors open? A. They were left open all the time during the summertime. We had them hooked open.

Q. Now, when those doors opened you could see all around the aisle clearly? A. Yes, sir.

Mr. Davis. I believe that is all.

The Court. You are all through with Mr. Schymansky?

Mr. Wendell. Yes.

* * * * *

172 John Graham, Witness for Defendant, District of Columbia,
on Direct Examination

By Mr. Gray:

Q. Where do you work? A. Eastern Market.

Q. For whom do you work? A. For Mr. Zambreny.

Q. What business is he engaged in? A. Poultry.

Q. Are you familiar with Mr. John R. Stone's fish stand in that market? A. Yes, sir.

Q. Will you state whether or not in the course of your work you had occasion in 1936 to go past Mr. Stone's fish stand? A. Yes, sir; I had occasions.

Q. How often would you go past that stand? A. About four or six times a day.

Q. Calling your attention particularly to the summer of 1936, and before July of 1936, will you state whether or not you ever saw any ice or water lying on the floor in the aisle in front of Mr. Stone's fish stand? A. No, sir; I have not.

Mr. Gray. You may inquire.

**John Graham, Witness for Defendant District of Columbia, on
Cross Examination**

By Mr. Wendell:

Q. Mr. Graham, where is your stand in relation to the Stone stand? A. Two stands from Mr. Stone's.

173 Q. Away over to the— A. It is on the same side as Mr. Stone.

Q. Yes; but is it west, east or south? A. South.

Q. His is in the southeast corner? A. His is in this corner (illustrating), and I am up in the other corner.

Q. Yours is in the southwest corner, then? A. Yes, sir.

Q. You do not know whether you were along there during the 30th of June, 1936, do you? A. What is that?

Q. You do not know whether you were along in front of Mr. Stone's stand on the 30th of June, 1936, do you? You cannot remember that day, can you? A. No, sir.

Q. And you cannot remember whether or not you were along there on the first of July, 1936? A. I would go in front of Mr. Stone's stand every morning.

Q. About 8 o'clock? A. At different times. Sometimes at 8 and 9.

Q. And then you would not go past there any more that day; only once in the morning? A. Oh, yes; I would go past there.

Q. You do not know whether or not you went there the first of July, 1936, do you? You cannot say whether you went there along about the first of July, 1936? A. 1936?

174 Q. Four years ago. A. Yes, sir; I went there every morning.

Q. Do you remember who was working at the stand besides Mr. Stone on July 1, 1936? A. I don't know the fellow's name. He was a stout fellow.

Q. And on July 2, 1936—do you remember being along there that day? A. Yes, sir.

Q. How do you remember that day? A. Every morning I goes in.

Q. About 8 o'clock? A. Between 8 and 9, something like that.

Q. Eight and 9 every morning. That is all.

**John Graham, Witness for Defendant District of Columbia, on
Re-direct Examination**

By Mr. Gray:

Q. You went in about 8 or 9. At what other hours of the day would you go past that stand? A. I would go by the stand, like 11 o'clock, and then again in the afternoon. I goes down and talks with Mr. Stone.

Q. How many times in the afternoon would you go past there? A. I would say, about a couple of times.

Q. That was every day? A. Yes, sir; I go down there every day.

Mr. Gray. That is all.

**John Graham, Witness for Defendant District of Columbia, on
Re-cross Examination**

By Mr. Wendell:

175 Q. You say you used to talk to Mr. Stone? A. Yes;
I used to buy clams from him.

Mr. Wendell. That is all.

A Juror. May I ask him one question, your Honor?

The Court. Very well.

By a Juror:

Q. Going by there did you ever do any work to help Mr.
Stone? A. No, sir.

The Juror. That is all.

(The witness left the stand.)

**Henry C. Beahm, Witness for Defendant, Stone, on Direct
Examination**

By Mr. Davis:

Q. Will you state your full name? A. Henry C. Beahm.

Q. Where are you employed? A. Washington Navy Yard.

Q. What is the nature of your employment there? A. I am
an electric crane man.

Q. Do you ever have business at the Eastern Market? A.
Quite often.

Q. Do you happen to know the layout there with respect to
a man by the name of Stone, his stand? A. Yes, sir.

Q. Do you see Mr. Stone in the court room here? A.
176 Yes, sir; that gentleman in the light suit (indicating).

Q. Do you ever deal with Mr. Stone? A. Quite
often; I buy fish and oysters from him.

Q. How long have you been going to that market? A. Ap-
proximately seven years.

Q. Did you go there in 1936? A. Yes, sir.

Q. I call your attention to the particular time of July 2nd. Did you visit the market in that period? A. I don't recall the date, but I went in there anywhere from three to four times a week.

Q. I will ask you what you observed during your visits to that market with respect to the condition of the aisle in front of Mr. Stone's place? A. Well, the aisle was completely vacant from counter to counter. There was a vacant stand on the opposite side of the aisle; I would say, the west side of the aisle. That was unoccupied. On the east side was Mr. Stone's fish stand.

Q. Have you ever seen anything on the floor? A. No more than a little sawdust around a drain there, kind of a hatch near the door on the south side of the market or the south end of the market.

Q. Mr. Beahm, this picture (indicating) has been introduced in evidence. Do you recognize that? A. Yes. That looks exactly the way the stand was at that time and at present. I think he occupies now the west side of the aisle. He has a stand on the east side of this aisle (indicating).

Q. Is that picture a fair representation of the condition of the aisle at all times when you have been in there? A. Most positively; yes.

Mr. Davis. That is all.

Henry C. Beahm, Witness for Defendant Stone, on Cross Examination

By Mr. Wendell:

Q. You said you were probably there in the month of July, but you do not know whether it was around July 1st, 1936, do you? A. No. I had no occasion to date it.

Q. You do not know whether you were there on July 1, 1936, do you? A. I was in there anywhere from two to three and sometimes four or five times during a week.

Q. I say, do you know whether or not you were there on July 1, 1936? A. I couldn't say.

Q. Do you know whether or not you were there on July 2nd, 1936? A. I do not.

Q. On July 3rd, 1936? A. As I say, I never dated any dates when I went to market. I had no occasion to.

Q. What hours do you work in the Navy Yard? A. From 4 in the evening until 12 at night. Saturdays at that time, in fact, up until last month, I was off every Saturday. We were only working five days a week. I had a lot of acquaintances and used to go there whether I wanted anything or not. I

would go up there and talk to people I wanted to talk to.
178 Q. When do you take your vacation every year? A.

I don't take any particular time.

Q. On the 4th of July? A. No, sir; I don't go off on trips like some people. I have better use for my money and time. It is more valuable to me in person.

Mr. Wendell. That is all.

(The witness left the stand.)

Thereupon—

**George Gotthardt, Witness for Defendant District of Columbia,
on Direct Examination**

By Mr. Gray:

Q. Your full name? A. George Gotthardt.

Q. Where are you employed? A. Health Department, District of Columbia.

Q. How long have you been employed by the Health Department? A. Twenty-three years.

Q. What particular duties have you performed during those 23 years? A. I was sanitary inspector for two years and food inspector for 21 years.

Q. Do you have occasion to inspect the food sold in the Eastern Market? A. The food that is sold and stored.

179 Q. In the course of the performance of your duties

do you have occasion to go to the Eastern Market?
A. Daily.

Q. Every day? A. Yes.

Q. What do you do when you go there? A. I inspect the foods on stands and the condition of the market.

Q. And if you find anything that you think ought to be corrected, what do you do about it? A. I generally go to the proprietor of the stand, if there is an obstruction in the aisle in the form of a box, for instance, and ask him to remove it.

Q. What is the purpose of your inspection? A. A sanitary inspection and the condition of the food.

Q. To see that it is fit for human consumption? Is that it?
A. That is it.

Q. Are you familiar with the stand of Mr. John R. Stone in that market? A. I am.

Q. Will you state whether or not you had occasion to pass that stand on your inspections of the market? A. Daily, every time I go to the market.

Q. How much of the market do you inspect? A. The whole market.

Q. You mean, you go up every aisle? A. Yes, sir.

180 Q. Do you inspect every stand in the market? A. Every stand that is occupied, and also the vacant stands.

Q. Will you state whether or not during the period of about July 1, 1936, you were inspecting Eastern Market? A. I was.

Q. At that period can you state whether or not you ever saw any ice or water standing in the aisle in front of Mr. Stone's fish stand? A. No.

Q. On any of these inspections have you seen a barrel of cracked ice standing right inside the C Street door, right up against Mr. Stone's fish stand? A. I have not.

Q. At what particular hours of the day do you go there—or do you have any particular time? A. There is no particular time, but I generally go about 10 and stay until about 11 in the morning.

Q. Are you there every day at that particular time? A. No; not every day, but mostly every day.

Q. Will you look at this photograph, please (indicating)? I call your attention particularly to a drain right near the corner. A. Yes; I know that drain.

Q. In the course of your inspection of the market, will you state whether or not you have had occasion to inspect that drain? A. I do every time I go there.

Q. Do you recall about July 1, 1936, seeing that drain
181 clogged up? A. No.

Q. If you did find the drain clogged up, what, if anything, would you do about it? A. I would have the obstruction cleared.

Q. Would the clogging up of that drain cause an insanitary condition? A. Naturally.

Q. You would therefore be looking for it particularly; is that correct? A. That is right.

Mr. Wendell. I object to all these leading questions. They have been leading all along.

The Court. I think it is about fifty-fifty with you gentlemen. If you will call it to my attention at the time I will try to correct it.

Mr. Gray. That is all.

**George Gotthardt, Witness for Defendant District of Columbia,
on Cross Examination**

By Mr. Wendell:

Q. You inspect all the markets, do you not? A. No; not all.

Q. How many of them? A. Two markets.

Q. Which markets? A. The Northeast Market and Seventh and C.

Q. You go to the Eastern Market generally at 10? A. Around 10 o'clock until 11.

Q. Do you remember what time you got there on July 1, 1936? A. No; I can't remember that.

182 Q. Do you remember whom you saw there? A. I saw the market master, Mr. Apple, and I saw Mr. Stone.

Q. Do you remember any other people you saw there? A. I saw the dealers in the market.

Q. You see them every day, you say? A. Yes.

Q. You went there about 10 and stayed until about 11? A. Yes.

Q. But you do not go back any more that day? A. No.

Q. Do you remember what hapened July 1, 1936? Do you remember that far back? A. I don't remember what hapened, because I didn't see anything happen.

Q. Do you remember what happened on July 2nd? A. No; I do not.

Q. Do you know whether or not it was a rainy day or a sunshiny day, July 2nd? A. I can't say.

Mr. Wendell. That is all.

(The witness left the stand.)

Thereupon—

**Jackson L. Apple Witness for Defendant, District of Columbia,
on Direct Examination**

By Mr. Gray:

183 Q. Your full name is Jackson L. Apple? A. Yes.

Q. Where are you now employed? A. The D. C. Home for Children.

Q. That is one of the institutions of the Board of Public Welfare of the District of Columbia? A. Yes.

Q. Directing your attention to July of 1936, where were you then employed? A. At Eastern Market.

Q. In What capacity? A. Market master.

Q. And you were, therefore, working under Mr. Roberts, the Superintendent of Weights and Measures of the District of Columbia; is that correct? A. Yes, sir.

Q. Tell the jury briefly what your duties were as market

master. A. They were generally supervisory duties. Farmers would come in and want stands and I would have to arrange places for them to stand when they came in, and collect the rents and see that everything was orderly around the place and kept in good order.

Q. Kept what? A. Kept in good order, and the place cleaned up properly, and so forth.

Q. What, if any, arrangements were made for the cleaning up of the market? A. The Superintendent of Markets had a janitor that worked over at his office, and he came over 184 at noon time, right after noon, and assisted in cleaning over there; and if he did not come, if he had him working out on a truck or something, me and my assistant over there did the cleaning.

Q. You yourself cleaned up? A. Yes; me and my assistant together. I always assisted him in cleaning before I left.

Q. How frequently was the market cleaned up? A. Well, we started cleaning around 2 o'clock. It was swept clean and all the trash removed and taken to the trash house. Then, during the day if something had gotten on the floor, like somebody dropped an egg or something like that, that had to be cleaned up. We only cleaned once a day.

Q. But you cleaned every day, did you not? A. Yes, sir.

Q. By the way: in July of 1936 at what hour was the market opened? A. From 7 o'clock in the morning until 6.

Q. Are you familiar with Mr. Stone's fish stand in that market? A. Yes, sir.

Q. Will you state whether or not it was part of your duties to circulate around the market and inspect? How much of the market did you keep under your supervision? A. I had all of the market under my supervision, and in passing through there at all times, either me or my assistant, if I saw anything—if a person had anything out in the aisle I saw to it that he removed it.

Q. Directing your attention to about the first of July, 1936, I will ask you whether or not at or about that time

185 you saw a barrel of ice, cracked ice, standing in front of Mr. Stone's fish stand, right inside the C Street door of the Eastern Market? A. No, sir. He didn't keep his ice in a barrel.

Q. Where did he keep his ice? A. Well, the fish were iced when they came in there, and he carried the box back of his stand, and sometimes he would have to have additional ice and he would use the fish box to go down and get that; or if there was a delivery made, as I remember it, it was most of the time delivered in a heavy canvas bag. I am not sure about that.

Q. Where would that canvas bag be taken? A. It would be taken back of the stand.

Q. Do you recall on any day in or about that period seeing a barrel full or partly full of cracked ice standing inside the market right in front of Mr. Stone's stand? A. No, sir.

Q. With your permission would such a barrel have remained in the aisle? A. No, sir, because it would have choked the passageway practically entirely, if there was a barrel standing in front of the stand there on the C Street side.

Q. Do you remember any occasion at that time or about that period when you saw, during the course of your inspection of the market, pieces of ice or any water standing in front of the Stone fish stand out in the aisle? A. No, sir, because the fish were taken back of the stand, and if there was any water that got on the floor the water would have drained off.

186 The floor is so elevated that it would have drained off.

Q. I am asking you specifically: did you ever see any ice or water standing there in the aisle? A. No, sir.

Q. What was the arrangement with regard to putting sawdust down? When did you put sawdust down? A. Well, I put sawdust down in rainy weather. If the floor was damp all around there, I would put sawdust all over that floor. As I remember it, I had sawdust back of Mr. Stone's stand. If there was any water in front of it, if there ever was an occasion when there was water in front of it, he could put it down himself. But the water didn't remain on the floor in the summertime

very long, because the doors were kept open and it would dry out very quickly. However, in the wintertime I did cover the floor more there, because if any dampness arose it would stay on there longer.

Q. You had quantities of sawdust on hand, did you not?
A. Yes.

Q. Did you use your own judgment as to when to put the sawdust down, or what arrangement was made about it? A. Well, if possibly one of the fellows that had a stand in there would call it to my attention, or I would see that the floor was damp and was not drying out, or if there was extremely wet weather, I would put the sawdust down even if no one called it to my attention.

Q. Do you know Mr. George C. Richards? A. Well, I am not very well acquainted with him. I only talked with him when he came to see me about having fallen.

Q. Do you remember what date that was that he
187 came to see you? A. It was on July 3.

Q. 1936? A. I don't recall.

Q. Was it 1936? A. I think so; yes.

Q. Where did he see you on that day, Mr. Apple? A. There in the market.

Q. Did you have an office in the market? A. Yes, sir.

Q. Did he come to your office? A. Yes, sir; he came to my office, but I walked outside there in the aisle and talked with him out there.

Q. What did Mr. Richards say to you on that occasion? A. He told me that he had fallen in the market. I don't remember what he said, whether it was the day before or a couple of days before that. He said he had fallen there in front of the Stone stand and it necessitated his having to go down to have an examination made; and I told him that I would take the matter up with the Corporation Counsel's office and have them make arrangements for his examination and care. Mr. Richards said that he didn't want me to do that, because it might cause him some trouble, and that he had sufficient in-

come that he wouldn't want to get any money from it or anything, and that possibly if I called them up about it, it might cause trouble, and he didn't care to do that. But I had to insist on his giving me his name and address so that I could report it to the Corporation Counsel's office and also to
 188 my superintendent. I called my office first, the Superintendent of Markets, and the office was closed at that time; it was after 4:30. So the next day was the 4th of July, and both the District Government and my boss's office was closed, and I made the report to my superintendent on the following Monday morning, and it was forwarded to the Corporation Counsel's office.

Q. After you had sent this report did you make an inspection of the aisle in front of Mr. Stone's stand? A. I called the attention of Mr. Richards—at the time he told me I asked him if the place was not in good condition then, and he said it was, and I told him that we had cleaned the market up the afternoon before, and I didn't see why there would be any water or anything there that would cause him to fall.

Q. What time of the day did Mr. Richards tell you that he fell? A. He didn't tell me that.

Q. Did he indicate whether or not it was in the morning or the afternoon? A. I don't recall that he did, sir.

Q. When you got this report from Mr. Richards did that refresh your recollection as to the condition you had observed at Mr. Stone's stand the day before, which was the day on which Mr. Richards said he had fallen?

Mr. Wendell. I object to that as being leading.

The Court. Sustained.

By Mr. Gray:

Q. State whether or not, after you heard Mr. Richards' complaint, you made an inspection of the aisle in front of
 189 Mr. Stone's stand. A. At the time that he made the complaint?

Q. Yes. A. We were standing in full view of it.

Q. Oh. You were right there at the scene? A. Not right at the stand, but in full view of it.

Mr. Wendell. I object to all this. It was on the day after, and we do not claim that it was in bad shape then, because they cleaned it up that same afternoon.

Mr. Gray. You may inquire.

**Jackson L. Apple Witness for Defendant, District of Columbia,
on Cross Examination**

By Mr. Wendell:

Q. You say the next day, when you saw Mr. Richards, you pointed out to him that the aisle was all right that day? A. Yes.

Q. You say that someone else cleans up the market generally, and you cleaned it up once in a while; is that right? A. When the janitor did not come over—if he happened to be on leave at that time—I assisted the other fellow that worked with me.

Q. But as a general rule, you generally cleaned up the aisles of the market? A. How is that?

Q. As a general rule somebody besides yourself cleaned up the aisles of the market; is that right? A. I assisted him. One week I opened up and the other fellow, my assistant, closed. The next week he opened up and I closed. The 190 time that I closed I always assisted the janitor in sweeping up, and the times that he closed, he assisted the janitor in cleaning up; and when the janitor didn't come—as he didn't do that week, because he was on leave—me and my assistant did the cleaning.

The Court. You mean, the week of the accident?

The Witness. Yes, sir.

By Mr. Wendell:

Q. Did you both clean up the same parts of the market, or

did he clean one part and you another? A. Well, as a general rule one started at one end and the other at the other.

Q. So you do not know what part of the market you cleaned on June 30, 1936, do you? A. I wouldn't say.

Q. You do not know what part of the market you cleaned on July 1, 1936, do you? A. No, sir; I do not.

Q. And you do not know what part of the market you cleaned on July 2, 1936, do you? A. No, sir; I couldn't say.

Mr. Wendell. That is all.

By Mr. Davis:

Q. I believe you said it was the practice to start cleaning at—what time in the afternoon? A. Around 2 o'clock in the afternoon, sir, because the man that opened it got off at 3 or maybe a little before that.

Q. That process of cleaning goes on from 2 o'clock every day to what time? How long does it take to clean up?
191 A. Well, it generally takes, to sweep the aisles and maybe remove some of the trash from the market—it generally takes about an hour, if there is a couple of us, to sweep the aisles and remove the trash. There may be a little more to do sometimes, but the floors were cleaned before either one of us left.

Q. Are you sure that on the average day it takes an hour to clean up; that by 3:30 or 3:15 your cleaning up is done for that particular day? A. Yes, sir. My time sheets show that I left there at 3 o'clock, so that the cleaning was done by that time.

Q. Your time sheet shows that you left the market on what date? A. July 2nd; when I reported in and when I left and when my assistant reported in and left, and also the janitor.

Q. And if the plaintiff testified that he was injured between 3 and 3:15 or after 3 o'clock, then you say that the market had been cleaned on that particular day before he was injured?

A. I am positive of that.

Mr. Davis. That is all, sir.

Jackson L. Apple Witness for Defendant, District of Columbia,
on Re-cross Examination

By Mr. Wendell:

Q. You testified that you did not know whether you cleaned or the other man cleaned the portion of the market where Stone's stand is? A. Yes.

Q. How do you know that was cleaned up by 3:15? A. Because I know we each go to a different end and
192 sweep that aisle on down.

Q. But if you do not know whether or not you cleaned that portion in front of Mr. Stone's stand on that day, how can you tell whether or not the other man swept the stand around 3 o'clock? A. I don't think he would have gone up there and swept the other places and not cleaned that one.

Mr. Wendell. That is argumentative, if your Honor please.

The Court. Ask him how he knows it.

Mr. Wendell. I am asking him how he knows it.

The Witness. I am positive we would have cleaned the whole aisle, because that was our practice.

By Mr. Wendell:

Q. You say these doors were always open, these two doors (indicating). Don't you know, as a matter of fact, that this door (indicating) is kept closed most of the time? A. I didn't say that both of the doors—I wouldn't be sure. One of them, I am positive, was open.

Q. If only one was open, that was the aisle-way for that door, right through there (indicating). There would not be a passageway after the door was closed, would there? A. I really don't know which.

Q. Is it not a fact that this door (indicating) is kept closed all the time and this (indicating) is kept open? A. I really don't know. It looks like there is a catch; the foot bolt is on this side (indicating).

Q. In July, 1936, this door was kept closed and this door kept open (indicating)? A. Yes.

193 Q. So there was not any passageway at all there through that door which was closed all the time; is that right? A. I couldn't say whether the door was kept closed. Sometimes we kept both the doors open. I wouldn't say whether it was open at that time or not. As a general rule we did keep—in the summer time we kept all the time at least one of the doors open. I wouldn't say whether we had both open or not.

Q. Is it not a fact that this door (indicating) was kept closed, and they put a barrel in there from time to time, filled full of ice, in this section out here (indicating on photograph)? A. No, sir, because if that barrel were kept here (indicating) Mr. Stone could not ice—

The Court. Hold it up so the jury can see. Turn the picture around.

The Witness. These doors open here (indicating), and I am positive I never saw a barrel. It would not be possible for Mr. Stone to ice his fish from the front of his stand.

By Mr. Wendell:

Q. You mean to say that he could not use it to put ice across here (indicating) instead of up in here (indicating)? A. No, sir; he wouldn't do that.

Q. You were there during the whole day when they iced their fish. Did you spend a whole day at the stand when they iced their fish? A. I wasn't there every morning. It was every other week.

194 Q. What is that? A. I opened the market one week, and my assistant closed it, and he opened the next week and I closed it.

Q. During this week in July, the week of July 2nd, do you mean to say that you were around that stand all the time? A. I was not around there all the time.

Q. You were in your office a good share of the time? A. I was in my office sometimes.

Q. And your office is in what part of the building? A. In the center of the building.

Q. How many stands are there in that building? A. I disremember now just how many there were. Some of them were empty. It was around fifty double stands. I don't recollect right now.

Q. Would that be one hundred single stands or fifty double stands? A. Each man had to have two stands. They were five dollars apiece. Each man had to have two stands to make one large enough to use.

Q. So that would be one hundred single stands or fifty double stands? A. I am not sure about that. I should know, but I don't recollect.

Mr. Wendell. That is all.

Mr. Gray. That is all.

(The witness left the stand.)

* * * * *

MOTION FOR DIRECTED VERDICT IN FAVOR OF THE DEFENDANT, DISTRICT OF COLUMBIA

Mr. Gray. Before your Honor goes to the prayers, I would like to make a motion for a direction of a verdict. On the basis of the whole case and on the ground that the case now shows definitely that the period within which the notice could have been served was limited to 15 minutes, that is to say, between the time the market was swept up and the time this accident happened at 3:15 and in the case of the District of Columbia v. Blackman in 32 Appeals D. C. page 32 the situation was that a pedestrian stepped into an excavation which
203 had been made in the street by a plumber for the purpose of connecting a house with the public sewer. The testimony showed that between the time of the making of that excavation and the time this pedestrian went into it was about four hours. In that case the Court of Appeals referred to the Woodbury case in the Supreme Court of the United States 132

U. S. and called attention to the fact that in the absence of actual notice or condition, constructive notice necessarily depends upon the facts, and the Court was very specific that while not specifying any particular period of time as the time within which constructive notice of the defective condition may arise, but we are of the opinion in this case since four hours elapsed that four hours is not the sufficient time within which to give rise to constructive notice. Now the situation is changed somewhat principally by reason of the testimony of Mr. Schymansky who is not a witness for the District. So far as the District's testimony goes it is uniform. All the people in the market, the customers in the market, the market-master, and the people who are in business say that that market was swept up every day around two-thirty or three o'clock. According to Mr. Richards, he fell at three-fifteen. Four hours is not sufficient to give rise to notice on a public street. Certainly fifteen minutes could not be sufficient to give rise to constructive notice of a defective condition within the confines of the market.

Of course the motion of whether or not actual notice arose is a question of fact and law but we have to take the case as it is now presented before the Court. There has not been a single word of rebuttal from the testimony of Mr. Apple or any of these merchants in the market nor of their employees.

204 Necessarily the defendants' testimony has to be negative but we are in this situation. Only one individual says he saw ice there in the market at a particular time but even if it was there we still wouldn't be liable. His own testimony contradicts directly the testimony of Mr. Schymansky because even if it should be considered for the purpose of this motion, your Honor will take the case most strongly in favor of the plaintiff. If it be considered that it was customary to have the ice delivered there and stored in front of the stand, nevertheless that question must give rise to the facts in this particular action. The facts in this particular action were that there was no barrel of ice in front of the stand because Mr.

Richards himself testified in answer to questions yesterday on page 22 (reading):

"Q. Now, Mr. Richards, after you fell—which side did you fall on, by the way?

"A. The right side.

"Q. Can you state whether or not your body covered this cesspool cover?

"A. A portion of it; yes; right in the corner."

Now the testimony about the barrel going to Mr. Schymansky was that it was a sugar barrel about two and half feet in diameter which stood, according to him, directly inside the C Street door.

I submit to your Honor that if it were where he said it was, it was standing directly on top of that cesspool cover and had it been there at the time, then Mr. Richards must necessarily have come in contact with the barrel; so that, if we are to give credence to the plaintiff's testimony it necessarily follows that the barrel of sugar wasn't there on this occasion, that if it be considered that it wasn't there on this occasion on which the accident occurred, then, what might have been the practice on other days goes out of the picture, because it was the presence of that particular barrel there on this particular occasion that would have prompted the ice to be there in the aisle. In that connection, I invite your Honor's attention to the weather report which is now in evidence. The Weather Bureau reports the weather condition on July 2nd, 1936, at 3 p. m., the temperature was 85 degrees and it was dry weather. As a matter of common sense the cracked ice—the pieces of ice which would have been sufficiently small to be of any use to Mr. Stone must necessarily have been of small dimension. Your Honor will take judicial notice of the fact that when the temperature is 85 degrees small pieces of cracked ice won't last long on the warm concrete floor, and the picture by Mr. Wendell shows that. The point I am making is that by Mr. Richards' statement he has made it impossible for him to have been injured at a time when the District could

have had any constructive notice. There isn't a word of actual notice. I submit the only thing I can talk about is the possibility of the arising of constructive notice. I respectfully move to direct a verdict for the District.

The Court. Under our present rule on this type of case I have been letting it go to the jury. I overrule it now.

Mr. Davis. I make the same motion.

The Court. Your argument would be different but I think I shall make the same ruling with respect to this. I can get your position definitely when we discuss the prayers.

* * * * *

254

CHARGE TO THE JURY

The Court. Now, ladies and gentlemen, as you know, you are the exclusive judges of the facts in this case. You will, of course, accept the principles of law that I am about to state to you. You will accept my statement of them as correct. You will carefully examine this evidence, which is quite conflicting in parts, and determine what you think the facts really are, and then apply to those facts the legal principles which I am about to state, and then determine whether or not your verdict shall be for the plaintiff or for the defendants.

If you think I have any view of the facts, do not be influenced by that. You are the ones to whom the law leaves the duty of deciding the facts. Of course you ought to make your decision from your judgment alone. Neither of us ought to be influenced in any way by any kind of sympathy for or prejudice against any one of the parties.

The charge here is that the District of Columbia and Mr. Stone were negligent in permitting some ice or water to remain upon the aisle of the market and that the plaintiff
255 slipped and fell as a result of that negligence.

As you know, the burden is upon the plaintiff, in so far as his charge of negligence against any one of these defendants is concerned, to prove it by a fair preponderance of

the evidence. That means a greater degree of evidence. It does not necessarily mean the number of witnesses, although that is a matter you are always entitled to take into consideration. It does not depend upon who called the witnesses; but after you have heard all the testimony the question to be determined is, Does the weight of this evidence, taking all of it together, show that the defendants or either of them were negligent? If so, the plaintiff has sustained his burden of proof.

Counsel have covered most of these points in their own language, so that whatever I give you now you must accept as the law.

The jury are instructed that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the defendant, John R. Stone, was negligent in the manner alleged in the declaration and that said negligence was the proximate cause of the injury to the plaintiff. If the evidence is evenly balanced or in a state of equipoise, your verdict should be for the defendant, John R. Stone.

You are instructed that the defendant Stone, in the absence of any evidence, is presumed to have exercised reasonable care towards the plaintiff in this case at the time and place and in the circumstances alleged in the declaration.

You are instructed as a matter of law that the defendant, John R. Stone, is not an insurer of the safety of the plaintiff at the time and place and in the circumstances as alleged in the declaration.

You are instructed as a matter of law that the mere happening of an accident creates no liability upon the defendant John R. Stone.

Those same principles are applicable, when you consider the case, against the defendant, the District of Columbia. The District of Columbia is not an insurer against accident to persons entering its market for the purpose of making purchases, or otherwise.

The burden of proving negligence of the defendant, the

District of Columbia, is upon the plaintiff. The mere happening of the accident does not shift to the defendant the burden of establishing that the accident did not occur through its negligence, nor does it create a presumption of negligence on the part of the District of Columbia. On the contrary, you are instructed that the legal presumption is that reasonable care was exercised by the defendant, the District of Columbia.

In this particular case each one of the defendants denies that it was guilty of negligence. Each defendant says that the real cause of the injury was the fact that Mr. Richards did not look where he was going, and that if he had exercised reasonable care in watching the condition of the aisle where he walked, he would have avoided the slippery substance, if it was there, and would not have fallen. In other words, it is charged that the plaintiff himself was guilty of contributory negligence. That is an affirmative defense, and the burden is upon the defendants to establish it by a fair preponderance of the evidence.

257 You should apply everything that I have just read to you in favor of the plaintiff when you come to consider the charge of contributory negligence.

The court instructs the jury that the burden of proof is upon the defendants to show that the plaintiff was guilty of contributory negligence; and, unless the defendants do so by a preponderance or greater weight of the evidence, then you should find for the plaintiff on that point.

The credibility of the witnesses is a most important fact in this case. You have a very great discrepancy between the testimony of the two sides. Sometimes we have discrepancies between the testimony of the plaintiff in chief and his testimony on cross examination. So that the question of whether you believe a witness or not is purely a question of fact and, therefore, for you to pass on. I cannot tell you that you must believe one witness and must disbelieve another. I can only point out some things which other jurors have taken into consideration and which, as reasonable men, have properly taken

into consideration in weighing the testimony of two people that are flatly contradictory in their stories.

You are naturally entitled to consider the opportunity of a witness to see what he is telling you about. We have testimony from witnesses who were employed at the stall, and next to it, and from others who were at opposite ends of the building, and also from those who were customers. Their opportunity to know what they were telling you about differed in most of those instances.

Four years or more have elapsed since this incident occurred, and some of the witnesses have said frankly that they were not clear in their recollection.

258 You are entitled to consider the attitude of a witness on the stand, whether he was candid and frank and answered the questions with an evident desire to tell you what he knew without regard to whether it hurt the plaintiff or the defendants, or whether he was evasive and was apparently considering the effect upon the person calling him to testify, in every answer that he made.

Of course you are entitled to take into consideration the financial interest of the witnesses in the case. Some of them had financial interests; some did not. That is a matter that you are always entitled to take into consideration.

We do have a rule which is only permissive. I will call it to your attention for what it is worth. This is the law, but the law leaves you permission to apply the rule, or not, as you see fit. If you believe that any one of these witnesses has committed perjury; that is, if he has wilfully and intentionally testified falsely about a material matter about which he could not reasonably be mistaken, then you may disregard the testimony of that witness altogether. And you notice that I say "may." I cannot tell you that you must disregard it. I cannot undertake to say to you that you should disregard it. But the law says to you that if you find that any witness intentionally lied about a material matter about which he could not reasonably be mistaken, then you may disregard all his testimony, or,

if you wish, you may pick out any part of it that you think was worthy of belief and give that such credence as you think it entitled to.

Now, coming to the facts of this particular case, the plaintiff says that the defendants were negligent. They deny
259 that and say that the plaintiff was negligent. So, while you have had a definition of negligence before, I should repeat it here.

Negligence is the doing of something which a reasonable, prudent person under the circumstances would not do, or failure to do what a reasonable, prudent person would do.

You notice that it is not a mathematical definition. It is the doing of something that a reasonable or prudent person would not do under the circumstances, or the failure to do what a reasonable or prudent person would do.

If you find that the plaintiff has established by a fair preponderance of the evidence that both of these defendants, or either one of them, were guilty of negligence, that is your definition.

The next question you have to consider is whether or not that negligence was the cause of the accident. If it was the proximate cause—that is, the cause without which the accident would not have occurred—then you should find for the plaintiff, unless you find that he himself was also guilty of contributory negligence which was also a cause without which the accident would not have occurred, in which event your verdict should be for the defendants.

Now, taking up, first, the charge against Mr. Stone, it is admitted that Mr. Stone occupied this stall at the southeast corner of the market. The charge is that he was negligent, that he caused or permitted ice and water to get on the floor of the aisle and that the plaintiff fell as a result thereof. Mr.

Stone denies this. You have heard all the evidence in
260 the case. The question for you first to decide is whether or not there was any ice there which caused Mr. Richards to fall, and if there was ice there, whether there was any

water which prevented him from catching himself before he fell to the floor.

If you find that those conditions existed, then the next question would be, Was that due to negligence on the part of Mr. Stone and, if so, was it the cause of the injury?

Mr. Stone denies that he permitted any ice or water to be there, and he says further that if it was there it did not get there through any negligence of his. So I should tell you specifically what the duty of Mr. Stone was in this connection.

The jury are instructed that it was the duty of the defendant Stone to use reasonable care to prevent the escape of any substance from behind or around his counter to the aisle adjacent thereto, or from in front of his stand, so as to make the use of that aisle unsafe to the public, and if the defendant Stone failed in this duty and such failure was a proximate cause of plaintiff's injuries, then they shall find for plaintiff against defendant Stone.

Now, when we say Mr. Stone we must include the acts of any employee of his. It was his duty to exercise reasonable care to prevent the escape of any substance from around his stall which might cause injury to passers-by. His duty to prevent it includes his duty to keep his employees from doing it either.

You are instructed as a matter of law that the only duty owed by the defendant, John R. Stone, to the plaintiff in this case was to exercise reasonable care not to create a dangerous

condition in said aisle of a nature dangerous to passers-
261 by, and unless you find from the evidence that John R.

Stone personally or by his agent or servant placed something in said aisle that did create a dangerous condition in said aisle, and that that was the proximate cause of the plaintiff's injury, then your verdict must be for the defendant, John R. Stone.

I have given instructions first by one and then by the other, and one states negatively what the other states affirmatively.

What I have just said deals with a condition which was created by Mr. Stone or his servants—placing something there

himself or permitting something to escape from around his stall out into the aisle.

There is some testimony to the effect that the ice man would fill a sugar barrel full of ice and it would remain in the aisle for some length of time, and from that the plaintiff's counsel contends that you may find that cracked ice had escaped from that sugar barrel which was in the aisle.

Ordinarily Mr. Stone would not be responsible for anything placed in the aisle by a third person; but there would be a modification there, that if that was placed in the aisle for his benefit and he knew that it was there, or it was there a sufficiently long time for him to find out about it, then he would be chargeable just as though he placed it there himself.

The jury are instructed as a matter of law that the defendant, John R. Stone, is not responsible for a dangerous condition existing in said aisle in front of his stand created by some third person not in his employ, and if you find from the evidence that said plaintiff was injured by a condition
262 created by someone other than the defendant, John R.

Stone, and not in his employ, then your verdict must be for the defendant Stone. But if you find from a fair preponderance of the evidence that ice had been placed in the said aisle for the use of Mr. Stone and that Mr. Stone actually knew of its presence there, or even if he did not actually know that it was there, if it had been in the aisle long enough for him reasonably to learn of its presence—that is, if he actually knew it was there or if it had been there long enough for him reasonably to know it was there—then if you further find that the presence of that ice in the aisle, placed there in a barrel by an ice man, was the proximate cause of the injury, then your verdict should be for the plaintiff against Mr. Stone, unless you find that the plaintiff himself was guilty of contributory negligence.

I think I have covered the law which would be applicable so far as the charge of the plaintiff against Mr. Stone is concerned.

Now, he goes further and charges that the District of Columbia did not exercise its duty with respect to the care of the market.

You are instructed that where the District of Columbia retains a proprietary interest in a market place, it is liable for its negligence the same as a private person.

That is, the same rule.

You are further instructed that the said District has the duty of using reasonable care to keep the aisles of the said market place in a reasonably safe condition for public use and
 263 if it carelessly and negligently omitted to exercise such care and the plaintiff was injured as a proximate result thereof, the plaintiff is entitled to recover against the District of Columbia.

You have heard the testimony as to the care which was exercised by the market master and the other people in the service of the District in taking care of that market, particularly the aisles. It is for you to say, as a matter of fact, whether what they did constituted the exercise of reasonable care.

You are instructed that there can be no recovery in this case against the defendant, the District of Columbia, until it is established that the accident was occasioned through the negligence of the employees of the District of Columbia, or as the result of the existence of a condition of which the District of Columbia had actual notice, or which had existed for such space of time before the accident and under such circumstances as would have afforded the District of Columbia sufficient opportunity to make proper inspection of the aisles of the market to ascertain their condition and to repair their defects.

These two statements that I have read to you must be construed together. The District of Columbia must exercise reasonable care to keep the aisles safe for the use of patrons.

If the offensive substance, if that ice was actually placed there, whether Mr. Stone knew about it or not, the District might still be liable—no; I will withdraw that. It is difficult

to say that the District would be liable unless Mr. Stone was.

Do you contend to the contrary, Mr. Wendell? You
264 think that the District would not be liable unless Mr.
Stone was liable?

Mr. Wendell. I think they are both liable.

The Court. If Mr. Stone is not liable, do you contend
that the District would be liable? I have been thinking about
that. I do not quite see—

Mr. Wendell. Of course on this drain proposition, as your
Honor said yesterday, this drain being clogged up—your Honor
remembers the testimony about that—that might create a
liability on the District. But I think they are both liable.

The Court. I understand that, but what I want to do is to
submit to this impartial body every possibility. They may
agree 100 per cent with you or disagree 100 per cent with you.

What do you say about that, Mr. Gray?

Mr. Gray. I think there are two separate verdicts possible.
In other words, one defendant could be negligent without
the other, depending, of course, upon the circumstances. Reasonable
care on the part of the District would not necessarily
be synonymous with reasonable care on the part of Stone.

The Court. Then you think it is possible, as a matter of
law, that there could be a verdict against the District and not
against Mr. Stone?

Mr. Gray. Yes; or vice versa.

The Court. You gentlemen agree on one proposition, then.

Now, going back to the duty of the District, you are in-
structed that the plaintiff cannot recover against the District
of Columbia until it is established that the accident
265 was occasioned through the negligence of the employees
of the District of Columbia, or as the result of the ex-
istence of a condition of which the District of Columbia had
actual notice, or which had existed for such space of time be-
fore the accident and under such circumstances as would have
afforded the District of Columbia sufficient opportunity to

make proper inspection of the aisles of the market to ascertain their condition and to repair their defects.

That is, if you find that the injury was due to the fact that some person had placed the offensive substance in the aisle—I do not suppose there is any evidence that it was placed there by the District of Columbia; it must have been placed there by somebody other than the District—then the question would be whether the District had exercised reasonable care in its inspection. If it was exercising reasonable care in inspection and this substance had been placed there without its notice, then it could not be liable unless it actually knew of that substance, or a reasonable time had elapsed within which it might reasonably have made an inspection and ascertained it.

You are instructed that constructive notice of a dangerous condition may be charged against the District of Columbia if it existed for such a length of time that the said District of Columbia either knew of its existence or, in the exercise of reasonable care, should have known.

While I am on this question of whether your verdict may be against either defendant, I will say as a result of this discussion that your verdict may be for the plaintiff against both defendants, or it may be for the plaintiff against
 266 either defendant. If it is against the District of Columbia and not against Mr. Stone, it will have to be for some act of negligence or some offensive condition which was not caused by Mr. Stone. That is, if you find from the evidence that the drain was so clogged that the material would not go down the drain, and that Mr. Stone himself was not guilty of negligence, but that the negligence was solely that of the District in failing to clean out the drain, then you might find against the District but not against the defendant Stone.

Now, coming to the charge of contributory negligence, as I have explained to you, contributory negligence is negligence on the part of the plaintiff which is a proximate cause of the injury; that is, without which it could not have happened.

In this particular case the defendants say that the plaintiff admits that he did not look at the floor and that ordinary every-day common sense would have told him that he should look at the floor, and that if he had he would have seen the difficulty and could have avoided it. Of course if he saw the ice and deliberately stepped on it, he was taking a chance as to the result.

The plaintiff, on the other hand, says it is not negligence for a person walking along an aisle of the market not to keep his eyes on the floor all the time. He is looking at the products which he wants to buy.

So, I think that is a question of fact for you to determine. We do know that if he had looked, and the ice was there, he would have seen it; but the question is whether a reasonable, prudent person in those circumstances would have looked at that floor as he went along. What a reasonable, prudent
 267 person under the circumstances would have done I think is a matter of fact for you. You know that we walk on the streets, we walk on the floors of stores and on the floors of these markets. Would a reasonable, prudent person in the exercise of due care have seen this ice and the condition alleged to be there? If in the exercise of reasonable care he would have seen it, and this person did not see it, then he was guilty of contributory negligence, and that would end the case. If a person doing what he did, acting as he did, would have been in the exercise of reasonable care, then he is not guilty of contributory negligence.

Counsel have stated it in several ways.

You are instructed that if you find from the evidence in this case that the plaintiff failed to exercise reasonable care for his own safety while walking in the aisle, and that his injury was produced by reason of his failure to exercise reasonable care, then your verdict must be for the defendant Stone.

You are instructed as a matter of law that one is required to make reasonable use of his faculties of sight to discover dangers to which he is or may become exposed, and if you find

from the evidence that if the plaintiff had exercised reasonable and ordinary care for his own safety he would have seen the water or ice in the aisle in time to have avoided the same, and failed to do so, then he was guilty of contributory negligence.

Of course the burden of proof is upon the defendants to establish in this case that there was contributory negligence. It starts with the presumption that he was exercising reasonable care. The mere happening of the accident is not evidence that he was careless, as I say, but the burden is upon the defendants to show by a fair preponderance of the evidence that he was negligent.

As I have explained, the verdict may be against one or both defendants. Just bear in mind that if it is against both defendants, then each one is responsible for it, so that whatever you think the plaintiff is entitled to should be in one sum. He is not entitled to half or a portion of it against either one.

Now we come to the question of damages. If you find for the defendants, that is the end of the matter. If you find for the plaintiff against either defendant or against both defendants, then the question is to award the proper damages.

Counsel for the plaintiff has already read to you his instruction on that subject, and without repeating it in words I will tell you the substance, although I think you are familiar with it.

The effort is to reimburse the plaintiff, not to punish anybody and not to reward him, but give him such sum as in your judgment will fairly and adequately compensate him for his injuries. It is admitted that his arm was broken. The plaintiff contends that while there has been a perfect union the result has been to restrict the use of the arm or wrist or both, and he also claims that there are other injuries, among others, an injury to the back.

The defendants claim that not only has there been a perfect union, but that he has as much use of the arm and wrist as he had before, and that the injury to the back was due to arthritis and that this accident did not have anything

269 to do with it, and that the only injury involved is that from which he has recovered.

That is a question of fact for you.

You will bear in mind that the burden of proof is upon the plaintiff to establish his injuries by a fair preponderance of the evidence and also to establish that the injuries were due to the fall, by a fair preponderance of the evidence. You will decide what you think was caused by the accident. If you find for the plaintiff, then you will take into consideration his medical expenses, the character of the injury, whether it is permanent or whether he has recovered from it, and then you will endeavor to recompense him for his pain and suffering up to date, and if you think there is any future pain and suffering you will take that into consideration and endeavor to arrive at such sum as will fairly, reasonably and adequately compensate him for the injuries which he has suffered and from which he may suffer in the future.

Is there anything else?

Mr. Wendell. You did not mention the hernia, your Honor.

The Court. The plaintiff claims that the hernia was caused by the fall and the defendants say that is not the fact.

Mr. Wendell. Will the court tell the jury about the charge that I read?

The Court. Plaintiff's counsel read to you the language which I decided was correct, and I will try to restate it without using the precise language.

Are you satisfied without my restating it?

Mr. Wendell. Yes, your Honor.

270 The Court. You may take the case, gentlemen.

(Whereupon, at 10:35 o'clock a.m., the jury retired to consider of their verdict, subsequently returning a verdict for the plaintiff against both defendants in the amount of \$750.)

* * * * *

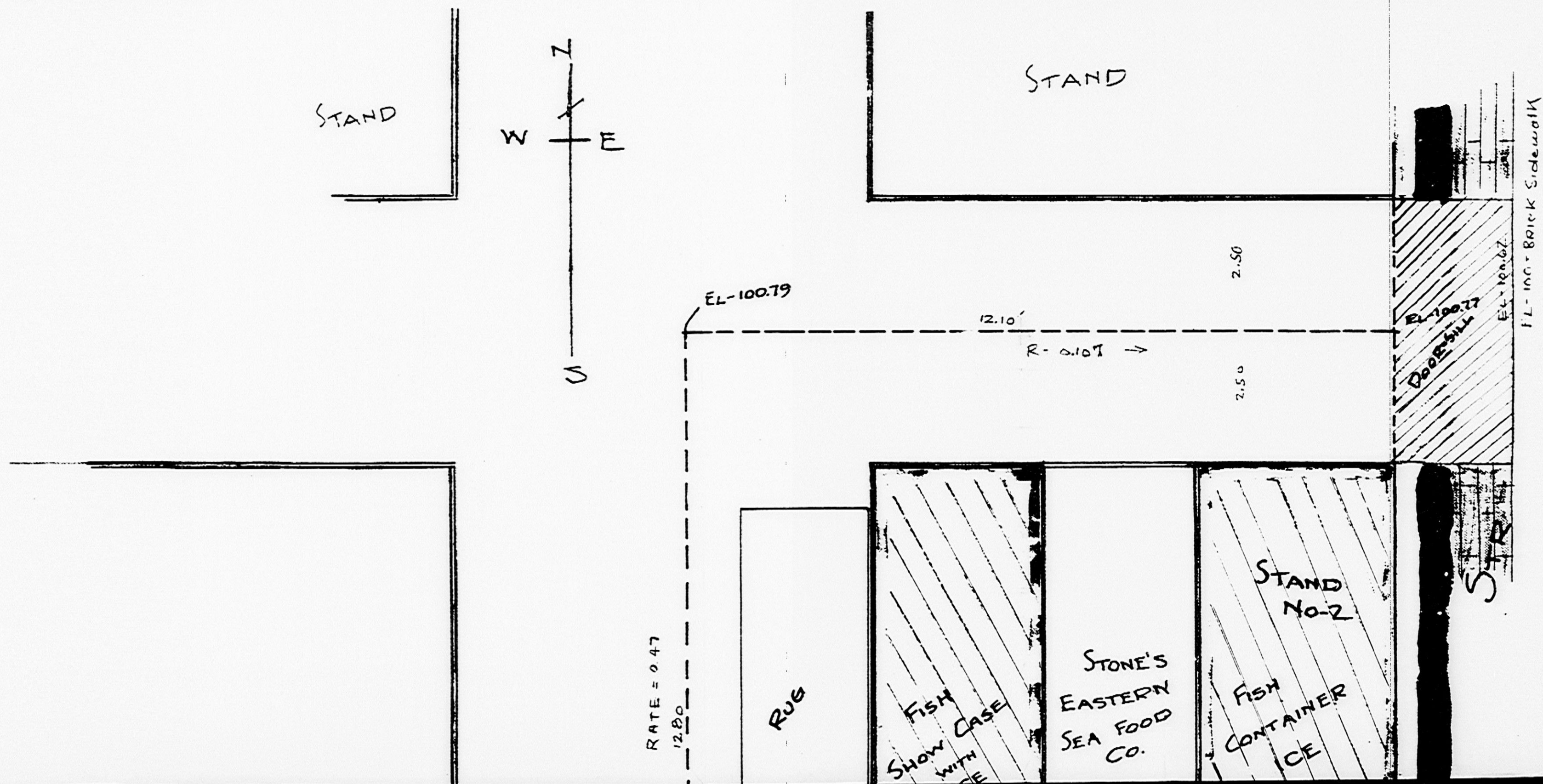
EXHIBIT FOR THE PLAINTIFF
Filed February 7, 1941



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D. C. EXHIBIT 2
Filed February 10, 1941



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SECTION OF EASTERN MARKET.

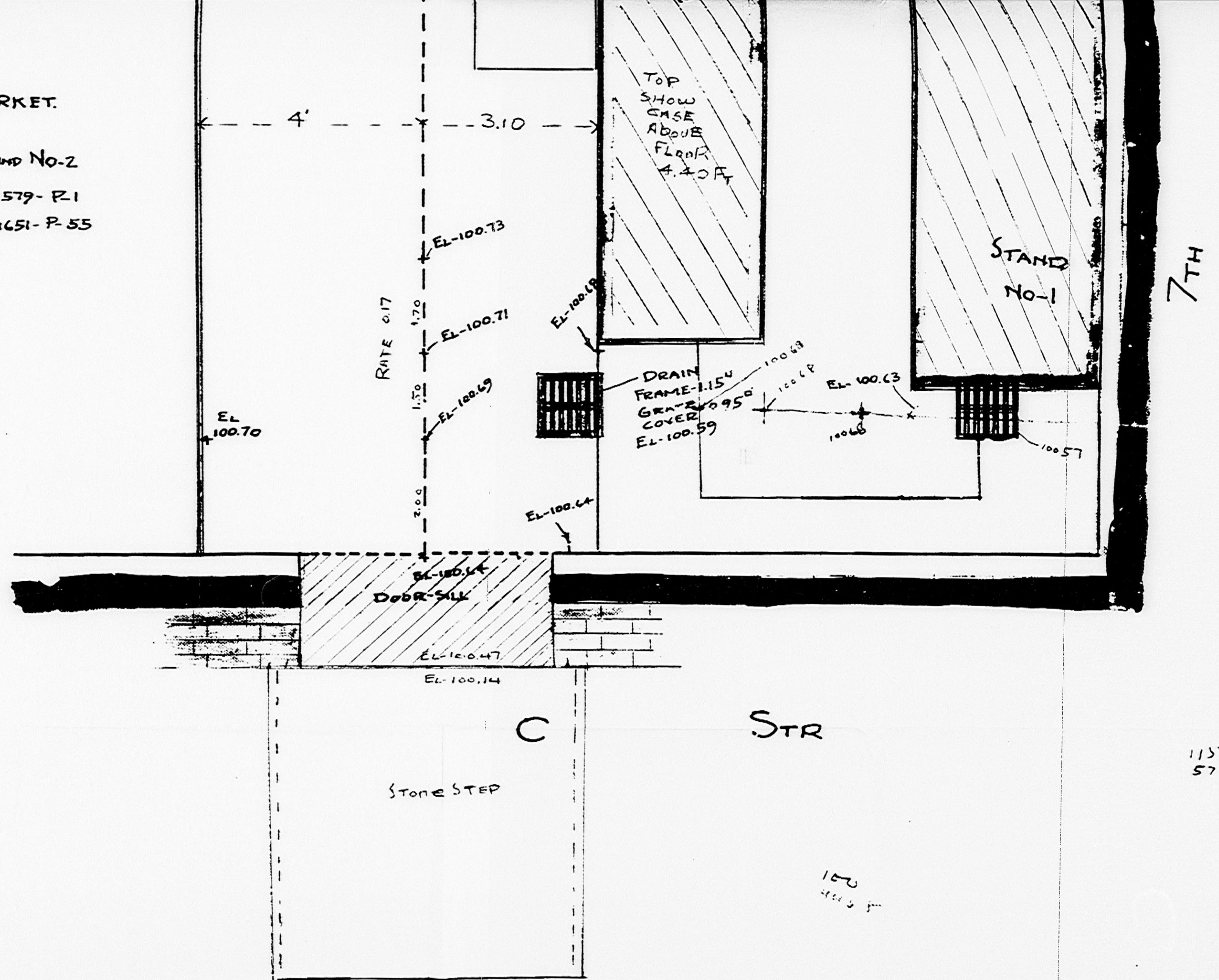
SHOWING

STONE'S FISH STANDS NO-1 AND NO-2

JULY - 22 - 1936 F.B-1579-P-1

NOV 9TH 1937 F.B-1651-P-55

Scale 1"=2'

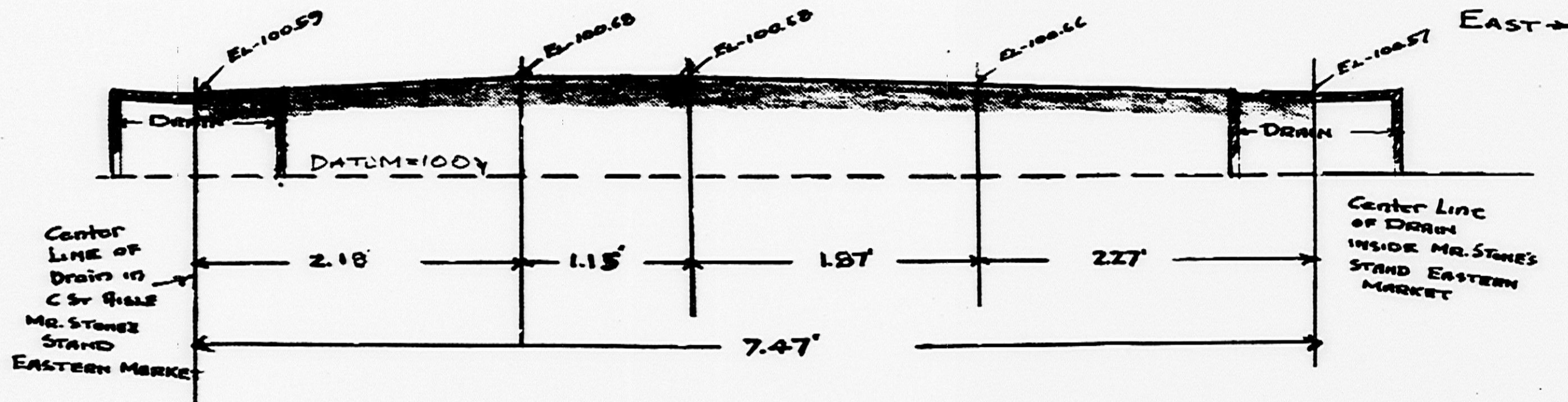


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D. C. EXHIBIT 3
Filed February 10, 1941

← WEST



Scale 1"=1'
G/H

PROFILE
Cement FLOOR MR. STONE'S FISH STAND
EASTERN MARKET - SHOWING 2 - DRAINS
AT THIS VICINITY

2.27
1.87
1.15
2.18
7.47

Endorsed on cover: No. 7830. District of Columbia, Appellant, vs. Richards, Appellee. United States Court of Appeals for the District of Columbia. Filed Feb. 11, 1941, Joseph W. Stewart, Clerk.

UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
FILED MAR 21 1941
JAMES H. HARRIS
CLERK

BRIEF ON BEHALF OF APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

JANUARY TERM, 1941

No. 7830

DISTRICT OF COLUMBIA, Appellant,

vs.

GEORGE G. RICHARDS, Appellee.

RICHMOND B. KEECH,
Corporation Counsel, D. C.,
VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.,
CHESTER H. GRAY,
Assistant Corporation Counsel, D. C.,
Attorneys for Appellant.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

JANUARY TERM, 1941

No. 7830

DISTRICT OF COLUMBIA, Appellant,

vs.

GEORGE G. RICHARDS, Appellee.

BRIEF ON BEHALF OF APPELLANT

JURISDICTIONAL STATEMENT

The District Court of the United States for the District of Columbia had jurisdiction to try this case for the reason that it is an action for damages, as set forth in the Declaration filed herein, in the sum of \$17,500. (Appellant's App. -----).

The United States Court of Appeals for the District of Columbia has jurisdiction under the terms of Title 18, Ch. 2, Sec. 26, D. C. Code, 1929, to review a final judgment of the United States District Court for the District of Columbia.

STATEMENT OF CASE

It is admitted that the Eastern Market is owned and controlled by the District of Columbia and that the codefendant

John R. Stone was the lessee of a stand in said market and conducted a sea-food business therein.

Plaintiff testified that on the afternoon of July 2, 1936, he went to Eastern Market for the purpose of buying some fish (Appellant's App. 12); that at about 3 o'clock, or 3:15 p. m., while walking in the aisle in front of the defendant John R. Stone's fish stand his left foot slipped on a piece of ice and his right foot slipped on the wet floor and he fell, breaking his arm; that at the time he slipped his left foot was about three feet from the drain located in the floor, shown in the photograph (Plaintiff's Exhibit) and that his right foot was about one foot from said drain (Appellant's App. 13); that when he fell his body covered a portion of the drain; that he got up; that the man who worked for the defendant, Stone, came from behind the counter and removed the lid from the drain; that the drain was stopped up; that the man swept with a broom underneath the edge of the counter and swept water and ice down into the drain and replaced the lid; that the lid had slots in it (Appellant's App. 14).

On cross-examination plaintiff testified that the lid of the drain was a grating; that there was no lid on the grating; (Appellant's App. 16); that he entered the market north of Stone's stand and walked south; that as he approached Mr. Stone's stand he paid no attention to the aisle in front of him; that he first saw the ice after he got up; that he first noticed water in the aisle after he got up; that the whole aisle between Mr. Stone's stand and the stand directly across was not wet; that the aisle was dry on the right side; that July 2, 1936, was Thursday (Appellant's App. 17); that he did not know where the piece of ice was on which he slipped (Appellant's App. 18); that there was plenty of light as it was about 3 o'clock or quarter after three in the afternoon, and the sun was shining; that he could not tell how large the piece of ice was (Appellant's App. 19); that he got up of his own accord, and walked out of the market (Appellant's App. 20); that the defendant,

Stone, had his back turned to the plaintiff; that plaintiff did not say anything to anybody (Appellant's App. 21).

Plaintiff was the only witness who testified on his behalf as to the cause of the accident.

The defendant, John R. Stone, testified on his own behalf that on July 2, 1936, he operated a sea-food stand in the Eastern Market (Appellant's App. 24); that the only entrance to his stand is at its north end, nearest to the 7th Street door of the market; that the door shown in the photograph is the C Street door, (Appellant's App. 25); that in addition to the drain in the aisle shown in the photograph (Plaintiff's Exhibit) there is another drain inside the counter; that there is a sink inside the counter where he washes the fish, and the water from the sink goes into the drain inside the counter; that no water comes out in the aisle (Appellant's App. 26); that merchandise is delivered to his stand through the 7th Street door principally (Appellant's App. 26-27); that on July 2, 1936, he had no helper or anybody working for him and that there was no one at his stand but the defendant, Stone, himself; that he did not see any ice or water in the aisle about the time of the plaintiff's accident; that he brought his merchandise to his stand early in the morning (Appellant's App. 27); that the drain in the aisle has never been clogged up (Appellant's App. 28); that he did not see the plaintiff fall; that the plaintiff said nothing to him about having fallen (Appellant's App. 29).

On cross-examination the defendant, Stone, testified that the water he used, and the water from his stand, goes into the drain inside the counter (Appellant's App. 31); that he had a man working for him on Fridays (Appellant's App. 32).

In answer to questions propounded by a juror, defendant, Stone, testified that his merchandise was delivered to him iced, in baskets and boxes; that it was delivered from the 7th Street door of the market, and taken behind the counter, and opened behind the counter; that his showcase is all closed except the slide doors in the back (Appellant's App. 33).

The witness Joseph C. Elbert testified on behalf of the defendant, District of Columbia, that he is employed as a Computing Engineer by the Highway Department of the District of Columbia; that he had made a survey of the Eastern Market and from the data thus obtained had made Defendant's Exhibit No. 2, the plat showing the location of Stone's fish stand, the aisle and the drains in the floor (Appellant's App. 34); that there is one drain located in the aisle in front of Stone's fish stand and another drain located in the floor behind the counter (Appellant's App. 37); that following the visit of the jury to the market he had made a survey to obtain the elevation of the drain inside the stand, and had made a plat showing the elevations of both drains and of the floor between the drains (Defendant's Exhibit No. 3) (Appellant's App. 38); that the drain inside the stand is on a lower elevation than the drain in the aisle (Appellant's App. 39).

The witness John C. Schymansky testified on behalf of the defendant, Stone, that he had been a part-time employee of the defendant, Stone; that he worked for Mr. Stone particularly on Fridays (Appellant's App. 48); that he was not working in the market on the day of plaintiff's accident; that he learned of plaintiff's accident the next day (Appellant's App. 49); that there could have been ice on the outside of the lid of the drain for the reason that ice was sometimes delivered from the C Street entrance shown in the photograph (Plaintiff's Exhibit) and dumped into a barrel (Appellant's App. 49); that the barrel would be in the corner just inside the door; that he did not come from behind the stand and sweep up the aisle on the day plaintiff fell (Appellant's App. 50); that ice was delivered about 10 a. m. and about 1 or 2 p. m. (Appellant's App. 52); that ice was scooped over the showcase from the barrel (Appellant's App. 53); that water would at all times run down the drain (Appellant's App. 55).

On behalf of the defendants the witnesses Edmond A Peake (Appellant's App. 42-43), Wilbur M. Barrows (Appellant's App. 45-46), and George P. Castell (Appellant's App. 46-47-

48) testified that they are merchants who on and prior to the date of the accident occupied stands in the Eastern Market; that they were familiar with the defendant Stone's fish stand and had occasion to go past it; that they had never seen any ice or water on the floor in front of Stone's fish stand. The witness John Graham testified (Appellant's App. 56) that on and prior to the date of the plaintiff's accident he was employed by a merchant who operates a stand in the Eastern Market; that he had occasion to go past Stone's fish stand from four to six times a day; that he had never seen any ice or water on the floor in the aisle in front of Stone's fish stand. The witnesses John W. Hartman (Appellant's App. 44-45) and Henry C. Beahm (Appellant's App. 58-60) testified that they are and for many years have been customers of merchants who conduct stands in the market; that they had never seen anything in the aisle in front of Stone's fish stand.

On behalf of the defendant, the District of Columbia, the witness George Gotthardt testified that he is and for 23 years has been employed as an inspector by the District of Columbia Health Department (Appellant's App. 60); that it was his duty to make a daily inspection of the stands and of the condition of the Eastern Market for the purposes of seeing that the food is fit for consumption and that the market is in a sanitary condition; that he made a daily inspection of the whole market and of every aisle in it; that he had never seen any ice or water standing in the aisle in front of Stone's fish stand; that he had not seen a barrel of cracked ice standing inside the C Street door in front of Stone's stand (Appellant's App. 61); that he made a daily inspection of the drain in the aisle; that the drain was not clogged about July 1, 1936, and if he had found the drain clogged up he would have had the obstruction cleared. (Appellant's App. 62).

On behalf of the defendant, the District of Columbia, the witness Jackson L. Apple testified that on the date of the plaintiff's accident he was Market Master of Eastern Market (Appellant's App. 63); that it was his duty to supervise the

market, rent stands, collect rents, and see that the market was kept in good order and cleaned up properly; that he and his assistant cleaned the market every afternoon; that every afternoon they started cleaning at about 2 o'clock and the market was swept clean and all trash removed (Appellant's App. 64); that he had not seen a barrel of ice standing in front of Stone's fish stand; that ice was delivered to Stone's stand in a canvas bag which would be taken behind the stand; that he would not have permitted a barrel to stand in front of Stone's stand because it would have choked the passageway; that he had never seen any ice or water standing in the aisle in front of Stone's stand (Appellant's App. 65), and that he had quantities of sawdust on hand and in rainy weather, or if the floors became damp, he placed sawdust on the floor (Appellant's App. 66); that it was his practice to begin cleaning the market at about 2 p. m., and the process of sweeping and cleaning the market generally required an hour; that his time sheets show that he left the market at 3 o'clock on July 2nd; that the market had been cleaned on that particular day by that time (Appellant's App. 69); that it would not be possible for Mr. Stone to ice his fish from the front of his stand (Appellant's App. 71).

At the conclusion of all of the testimony the defendant, the District of Columbia, moved for a directed verdict on the ground that there was no evidence that the District had notice, either actual or constructive, of the presence of water or ice in the aisle. This motion was overruled. (Appellant's App. 75).

The verdict was for the plaintiff in the sum of \$750. (Appellant's App. 10-11).

STATEMENT OF POINTS RELIED UPON BY APPELLANT

1. That the Court erred in overruling the motion of the appellant, the District of Columbia, for a directed verdict at the conclusion of the whole case.

SUMMARY OF ARGUMENT

This is an action for damages for personal injuries alleged to have been sustained by appellee on July 2, 1936, at 3 or 3:15 p. m., by slipping and falling over ice and water alleged to have been negligently permitted by appellant to remain on the floor of an aisle of the Eastern Market, a market under the control of the District of Columbia. No actual notice of the existence of ice or water in the aisle was proved. The evidence offered by appellant showed conclusively that the presence of water or ice in the aisle was not customary or usual. Appellant's evidence further showed that the market was swept every day by the Market Master, beginning at 2 p. m. and finishing at 3 p. m. Appellant contends that if ice or water in fact existed in the aisle, sufficient time had not elapsed between the time the market was swept and the time appellee claims to have fallen for constructive notice of the alleged dangerous condition to have arisen.

ARGUMENT

No evidence was introduced tending to prove actual notice on the part of the appellant of the existence of ice or water in the aisle. The uncontradicted testimony of the merchants, their customers, the Health Inspector and the Market Master was that the presence of ice or water in the aisle was not customary or usual. Further, the uncontradicted testimony of the Market Master was that the market was swept every afternoon, beginning at about 2 o'clock. Since plaintiff testified he fell between 3 and 3:15 p. m., it is the contention of appellant that if ice or water in fact existed in the aisle, the appellant could not be held to have had constructive notice of its existence.

In the case of *District of Columbia v. Blackman*, 32 App. D. C. 32, the District of Columbia had issued a permit to the owners of certain houses under construction and to their plumber to make an excavation in the sidewalk for the purpose

of connecting the said houses to the public sewer. The excavation made under this permit was 2 feet 6 inches wide, 2 feet 9 inches long, and 7 or 8 feet deep, and occupied about one-third of the sidewalk. The excavation was completed at 11 o'clock on the day of the accident and was permitted to remain open, unguarded, and unprotected. At 3 o'clock on that day plaintiff, while walking along the sidewalk, paused to note the progress of the work, stepped backwards and fell into the excavation. In the ensuing action for damages the Trial Court overruled the motion of the District of Columbia for a directed verdict. This Court held that the overruling of the motion by the Trial Court was error, saying:

"The remaining question necessary to be considered relates to the refusal of the court to direct a verdict for the District.

"Having issued the permit authorizing the hole to be dug, the District was chargeable with knowledge of the prosecution of the work, and the duty of supervision over it to the end that the safety of the public be secured. Was the District remiss in its duty? The work was commenced three days prior to the accident, and until the trench was fully dug the requirements of the permit as to protection were complied with. It therefore clearly appears that in the first instance the District was not guilty of negligence, because sufficient protection was provided to guard the public against danger. From the completion of the excavation at 11 o'clock in the forenoon of the day plaintiff was injured until within a very short time prior to the accident, one of the men employed in digging the hole remained near it. A representative of the District, seeing this laborer near the hole he had assisted in digging, and apparently guarding it, naturally and reasonably would have inferred that he had been placed there not merely to await the coming of material to be put into the hole, but to warn the public of the existence of the hole, and thereby fulfill the conditions of the permit.

"There was no evidence before the jury that the District had knowledge, either actual or constructive, of the unguarded condition of the hole at the time plaintiff fell into it. On the contrary, the circumstances as disclosed by the evidence were such as to warrant the District in believing that the conditions of its permit were continuing to be carried out. If therefore in the circumstances of this case the District is to be chargeable with liability, we must in effect impose upon it the duty of placing a representative in direct supervision over every similar work in the District. We do not so understand the law.

"Dwellings being even more necessary than streets or sidewalks, permits for their erection and work incident thereto must, of course, be granted. Having issued a permit, the District must exercise reasonable care to see that its conditions are obeyed. But that does not constitute the District an insurer of the public, nor require it instantly to take notice of a failure on the part of a licensee to fulfill his obligations under the license. No hard and fast rule can be made, because each case must be determined according to the facts and circumstances surrounding it. What would be due care in one case might constitute negligence in another.

* * * * *

"In the present case the District having fulfilled its duty in the first instance, we do not think there was any evidence before the jury tending to show negligence on the part of the other defendants for a sufficient length of time before the accident to impute knowledge of such negligence to the District. This is equivalent to saying that there is not sufficient evidence in the record to support a judgment against the District, and that, therefore, its prayer for a directed verdict should have been granted."

On the facts presented, this case is identical with the case of *F. W. Woolworth Co. v. Williams*, 59 App. D. C. 347, 41 F. (2d) 970. In that case plaintiff entered the defendant's Five

and Ten Cent Store about 5:30 p. m., made a purchase and was leaving through one of the aisles when she slipped and fell, breaking her arm. She was the only witness who testified on her behalf as to the cause of the accident. She stated that when she was assisted from the floor to a chair she noticed an oval shaped spot on the floor at about the point where she fell; that it was slightly raised above the floor, and that she had no doubt but that her heel went into this spot and caused her to slip. Error was assigned on the refusal of the court to direct a verdict for the defendant. In its opinion this Court held:

"The burden of proving defendant's negligence is upon the plaintiff. The mere happening of the accident does not shift to the defendant the burden of establishing that the accident did not occur through its negligence, nor does it create a presumption of negligence. On the contrary, the legal presumption is that reasonable care was exercised by the defendant.

* * * * *

"The defendant is not an insurer against accident to persons entering its store for the purpose of making purchases or otherwise. Until it is established that the accident was occasioned through the negligence of defendant's employees, or as the result of the existence of a condition of which defendant had either actual or constructive notice, there can be no recovery. The rule as to notice is well settled in the case of *O'Dwyer v. Northern Market Company* and the District of Columbia, 24 App. D. C. 81, 88, where the plaintiff slipped on some green vegetable matter which was on the sidewalk in front of the market house."

In the *O'Dwyer* case the testimony showed that for a whole year the sidewalk in front of the market had been constantly in the same obstructed condition. This Court carefully differentiated that situation from that of the occurrence of an isolated and unusual obstruction, holding:

“****This is not the case of a banana peel or other similar refuse matter of a dangerous character thrown upon the sidewalk by some reckless or heedless person, and causing injury to someone who slips upon it. In that case the rule is plain that the municipality is not liable until it has had notice, or opportunity of notice, of the obstruction.’ ”

In the *Woolworth* case, this Court held, further:

“Conceding that defendant observed the spot on the floor immediately following the accident, this is not sufficient in itself to establish her case. Plaintiff made no attempt to show how or by whom the spot was created, or how long it had existed. It may have been occasioned by some other customer, having no connection with the defendant, dropping or spilling something on the floor. This well might be, considering the fact that the evidence shows that the floor had been swept only a few minutes prior to the accident. Plaintiff cannot sustain her case by merely showing that a spot was there. The burden rests upon her to establish its presence under circumstances which would charge defendant with responsibility therefor. This she failed to do, but rested her case solely on the existence of the spot on the floor.

* * * * *

“Applying the foregoing well-established rules, as to the liability of a storekeeper for the safety of his customers, to the case at bar, there is no theory upon which the judgment can be sustained. To uphold this judgment would be equivalent to making the defendant an insurer for the safety of its customers while in its store, and this is not the law.”

In this case the ice and water upon which the plaintiff fell was not placed there by any agent or employee of the District, and hence the District could be liable only if there were proof of actual notice to the District of the existence of the ice and water on which plaintiff fell or proof that the ice and water

had remained in the aisle for such a length of time that the District would be charged with constructive notice of its existence.

For the reasons stated it is respectfully submitted that the Court erred in refusing to direct a verdict for the District at the conclusion of the whole case.

RICHMOND B. KEECH,
Corporation Counsel, D. C.,
VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.,
CHESTER H. GRAY,
Assistant Corporation Counsel, D. C.,
Attorneys for Appellant,
District of Columbia,
District Building.

Brief for Appellee, George G. Richards, and Appendix

IN THE United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

January Term, 1941

No. 7830

DISTRICT OF COLUMBIA, *Appellant*

vs.

GEORGE G. RICHARDS, *Appellee*

Appeal from the District Court of the United States
for the District of Columbia

WILLIAM WENDELL

JOHN A. WEIL

RICHARD W. OLIVER

402—6th Street, N. W.

Washington, D. C.

Attorneys for Appellee

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

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Appeal from the District Court of the United States
for the District of Columbia.

BRIEF OF APPELLEE.

Counter Statement of Appellee.

Appellee accepts the statement of the case made by appellant, with the following counter statement of additional evidence:

John C. Schymansky, a witness for defendant, Stone, testified on cross-examination; that he has seen the aisle slippery (Tr. 126); that water would drop down from the case and some of it would leak into the trap (App App 51);

that on various occasions he swept the ice and water in the aisle and cleaned up the top of the trap and swept the ice down in the trap (App App 50, 52); that the drain in front of Stone's stand became clogged from time to time and had to be cleaned out so that the water could drain down (App App 51); that sawdust and paper sometimes got into the slits of the trap and that if the water didn't wash it out, he would clean the holes out (App App 55).

Appellee, in testifying on his own behalf, described his injuries as follows: That there was a blow on the side of his head; (Tr. 26). That he also broke his arm, bruised his side and hip; that he had hurt his back; that a hernia developed; (Tr. 26); that as a result of these injuries, he was unable to sleep properly; (Tr. 27); and that the use of his right arm is greatly restricted (Tr. 28). He also testified that he had seen ice on the floor prior to the day he fell (App App 22).

A statement by Dr. J. Albert Potter, who was critically ill at the time of the trial, and which it was stipulated would be the substance of his testimony if present, may be summarized as follows: That plaintiff was injured on July 2, 1936, and was shortly thereafter examined and treated by Dr. Potter; that X-rays showed a definite comminuted fracture of the lower extremity of the radius; that plaintiff had injuries to his right arm, hand, wrist, right hip, lumbosacral and sacro-iliac areas of the back, right groin, and abdominal muscles; that heart action was abnormal; that the above injuries and abnormal heart action were, in the doctor's opinion, due to the fall on July 2nd, 1936; that pleurisy and nervousness also resulted and continued; that the doctor treated plaintiff until the middle of 1939; that plaintiff suffered with headaches and dizzy spells; that in the doctor's opinion, there are permanent injuries to plain-

tiff's right arm, hand, wrist, nerves, back and a permanent hernia in the right groin area. (Tr. 46, 47, 48.)

Summary of Argument.

Appellee contends that appellant knew of the nature of Stone's business and knew, or, by the exercise of due care, should have known, that ice and water would frequently be present in the aisle in front of Stone's stand, and was present in the aisle in front of Stone's stand, and that the appellant knew, or, by the exercise of due care, should have known, that the drain in the aisle in front of Stone's stand was frequently from time to time clogged, and was clogged on the day appellee fell; and that appellant failed to see to it that sawdust was sprinkled in the aisle in front of Stone's stand the day appellee fell, or in lieu thereof, that appellant did not take other steps to remedy the dangerous condition existing in said aisle, or to see to it that the drain in the aisle was kept cleaned out properly; when the appellant knew, or, by the exercise of due care, should have known, of the existence of said dangerous conditions.

Appellee further contends that, in view of the testimony of the witnesses, the jury was warranted in finding that the aisle in front of Stone's stand, including the drain, was in a dangerous condition prior to, and at the time appellee fell, and was further warranted in finding that the appellant knew, or, by the exercise of due care, should have known, of said dangerous condition, and that appellant failed to take the proper steps to see to it that the said dangerous condition was prevented from existing and failed to see to it that said condition was remedied after it had come into existence; appellant, at all times, exercising a proprietary control over the aisle in front of Stone's stand in the market.

Appellee's Argument.

I. Appellee alleged in his declaration several acts of negligence, among which is the following: that appellant carelessly and negligently allowed the aisle in front of Stone's stand to be slippery and dangerous, and carelessly and negligently failed and omitted to use sawdust or any other substance to remedy said dangerous condition, although appellant knew or should have known of the dangerous condition. (Appellant's Appendix 3, 4.)

Appellant admits in its plea that it knew that defendant Stone was engaged in the sea-food business at his stand. It is admitted that, at the time appellee fell, appellant exercised a proprietary control over the Eastern Market. (Appellant's App. 7.) Knowing that Stone sold fish at his stand, appellant must have known that it was necessary for ice to be used in connection with the conduct of the fish business. See *Shalley v. New Orleans Public Service Company*, 159 Louisiana 519, 105 Southern 606. Appellee calls attention to these words: "When, therefore, a defect is produced by some known permanent cause which would naturally create a defect, the existence of such cause may be properly considered by the jury in determining whether the officers of the town or city might have had notice of the defect by the exercise of proper care and diligence." *Olson v. Worchester*, 142 Mass. 536, 8 Northeastern 441. See *Post v. Boston*, 141 Mass. 189, 4 Northeastern 815. In the present case the only difference as to facts is that a fish stand was the cause of the icy and wet floor, while in *Olsen v. Worchester*, *supra*, the wet and icy walk, which produced the injury was caused by a drain pipe from a nearby building which discharged water onto and across the sidewalk. Therefore there is no reason why the above quotation cannot be applied to the case at bar.

The witness, Schymansky, testifying on behalf of defendant, Stone, testified, on cross-examination by Mr. Wendell, as follows, in regard to the condition of the aisle where appellant fell; that the drain became clogged at various times and had to be cleaned out so that the water could drain down (Appellant's App. 51); that he has seen the aisle slippery (Record 126; Appellee's App. 1). On cross examination by Mr. Gray, Schymansky made the statement that at different times he was forced to use a broom in order to clear the aisle of ice or water (Appellant's App. 52). He testified that water would drop down from the stand and some leaked in the drain, and sometimes there was sawdust in front of the stand and the water was swept around there (Appellant's App. 51). He testified that ice was at various times brought to Stone's stand and dumped into a barrel which sometimes stood in the C Street corner of the aisle, over the drain. (Appellant's App. 49.)

Appellant admits in its plea that it did not sprinkle sawdust in front of Stone's stand the day appellee was injured (Appellant's App. 9). Appellant admitted, through Mr. Apple, its Market Master, that sawdust was put on the floor in rainy weather or if the floor was damp (Appellant's App. 65, 66). The condition that Schymansky testified to, in regard to the condition of the aisle in front of Stone's stand from time to time (before appellee was injured) was a condition far more dangerous than could be created by it being a rainy day outside. And yet appellant, through its Market Master, admits that there was no sawdust put down in the aisle in front of Stone's stand the day appellee was injured.

Appellee testified, in regard to the condition of Stone's stand on the day he fell, that his left foot slipped on a piece of ice and his right foot on the wet floor; that there was

water around there; that the spot where he slipped was near the drain; that the drain was stopped up and that, after he fell, the man behind the counter came out and cleaned the top of the drain and swept the ice, water and sediment down the drain (Appellant's App. 13, 14, 15).

Appellee contends that appellant was negligent, in view of what is stated before, in not having sawdust sprinkled in the aisle in front of Stone's stand. And appellee contends that the appellant was negligent in not taking other steps to remedy the condition set out above.

The above evidence entitled the jury to find that the District could have, by diligence, discovered and remedied the dangerous condition just described, and was therefore negligent in failing to do so.

II. In regard to notice, appellee contends that evidence showing actual or constructive notice on the part of the appellant in regard to the dangerous condition of the aisle can justifiably be inferred from the record. The testimony of the witness Gotthart, who is a health inspector in the employ of the appellant, and who was brought forward as a witness for appellant, stated that his duty, among other things, was to inspect the Eastern Market and to see that no condition dangerous to the health of the public was permitted to exist. He related that he, in pursuance of his duty, visited the Eastern Market daily; that he inspected every aisle therein and that he specifically inspected the drain in front of defendant Stone's counter every day (Appellant's App. 62). The inspector of appellant, in his evidence claimed that he examined the drain and failed to notice or report any defect. This was in spite of the fact that it was shown by the testimony of appellee that the drain was

clogged at the time he fell and that there was water and ice in the aisle which dangerous condition was then remedied by Schymansky, who cleaned the drain and then swept the water and ice down the drain (Appellant's App. 14). *Moon vs. Ionia*, 81 Mich. 635, 46 N. W. 25. It was further shown that this condition had existed, from time to time, prior to the day of the injury. See *District of Columbia vs. Frazier*, 21 App. D. C. 154, 273 Fed. 738. Appellee testified that he had seen ice on the floor before (Appellant's App. 22). The witness, Schymansky, stated by way of cross-examination that the drain became clogged at various times prior to appellee's fall, and had to be cleaned out so that the water could drain down (Appellant's App. 51). It was stated by this witness that the aisle was wet from time to time before the accident and he reiterated his contention concerning the drain later in the course of the examination (Appellant's App. 51). Compare *Nothdurft vs. Lincoln*, 66 Neb. 430, 92 N. W. 628; where in the course of discussing permissible inferences the Court said: "If the witnesses who testified as to the condition of the walk, or any of them, had stated that it was unsafe, the jury might have inferred, from the fact that the sidewalk inspector saw it, that he knew of the condition testified to by the witnesses". This statement applies directly and factually to the *Richards* case. The health inspector said he inspected the aisle practically every day, and noticed nothing defective. The jury was entitled to discount his words, and infer the existence of actual notice to the District. This is necessarily so, because other witnesses, as detailed beforehand, stated and described the shortcomings of the drain and also testified of the dangerous condition, caused by the icy and wet flooring in the aisle. A situation which obviously was not hidden. See *Moon vs. Ionia*, *supra*.

On re-direct examination, Schymansky made the statement that at different times he was forced to use a broom in order to clear the aisle of ice and water (Appellant's App. 52). He testified that water would drop down from the stand and some leaked in the drain, and sometimes there was sawdust in front of the stand and the water was swept around there (Appellant's App. 51). He testified that ice was at various times brought to Stone's stand and dumped into a barrel which sometimes stood in the C Street corner of the aisle, over the drain (Appellant's App. 49).

Appellee feels that all of this evidence shows that appellant either had, or by the exercise of due care, should have had notice that the ice and water in the aisle and the drain also were creating a situation dangerous to those members of the general public using the facilities of the Eastern Market; that appellant failed in its duty to keep the aisle in front of Stone's stand in a reasonably safe condition and that it is liable for the injury to appellee which was the direct result of its negligence. District of Columbia vs. Frazier, *supra*.

A very apt quotation illustrates the nature of appellant's notice. In Scheckell vs. Ice Plant Co., 180 S. W., 12, Missouri, the Court said: "The law fastens liability on the element of knowledge, whether it be actual or constructive, and to be aware of certain facts and circumstances which would lead ordinary careful and vigilant persons to know about a certain condition is in the eyes of the law, knowledge of that condition. In other words, in the face of certain facts and circumstances, a person will not be heard to say 'I did not know'".

To further strengthen appellee's claim as to notice, the attention of the Court is respectfully called to the testi-

mony of Jackson Apple, the Market Master at Eastern Market, that he and his assistant cleaned every aisle, including the aisle in front of Stone's stand (Appellant's App. 64); that shortly prior to appellee's fall, the whole market was cleaned out (Appellant's App. 69). Now Apple testified that he and his assistant cleaned out the market almost every day, and that on the 2nd day of July, 1936, he and his assistant cleaned the market, one beginning at one end of the market and the other beginning at the other end (see Appellant's App. 68, 69). Under cross examination (Appellant's App. 69) Apple admitted that he did not know what part of the market he cleaned on July 2, 1936, and did not know what part of the market his assistant cleaned on that date. There is no evidence at all that Apple cleaned in front of Stone's stand. There is not a word of testimony that either he or his assistant cleaned out the drain on that day before appellee fell. Appellant, District of Columbia, did not produce as a witness, the assistant who assisted Apple in cleaning out the market, and appellant did not account for the failure on its part to produce the aforementioned assistant. If the appellant's contention that the aisle was cleaned just before appellee fell is correct, then the appellee contends that the cleaning, if done at all, was done carelessly and without remedying the dangerous condition of the aisle, including the clogged drain in front of Stone's stand, especially in view of appellee's testimony that the drain was clogged when he fell (Appellant's App. 14). It seems highly improbable that a previously clean drain would clog up with sediment or dirt in a few minutes. Appellee admitted (Appellant's App. 65) that there was no sawdust put on the floor that day, and appellant in its plea made the same admission (Appellant's App. 9).

In view of the foregoing, appellee respectfully submits, that there was sufficient evidence of notice to require submission of the case to the jury. "It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the Court." *Grand Trunk Railroad Co. v. Ives*, 144 U. S. 408, 36 L. Ed. 485, 12 S. Ct. 679. Compare *City of Hamilton v. Haferkamp*, 53 Ohio App. 381, 4 Northeastern (2nd) 995, where a picture of defect was shown and experts certified that the defect could not have reached that stage in a few days. This was held sufficient evidence of notice to go to the jury.

The importance of the evidence as to the physical condition of an object which causes an injury has been discussed by this Court in *District of Columbia vs. Payne*, 13 App. 500. In that case plaintiff stepped on a sewer trap cover located on the sidewalk. The cover gave way and plaintiff was injured. Two lugs held the cover. The cause of the accident was the fact that one of the lugs had been broken sometime prior to the accident. There was no evidence as to the length of time the lugs had been broken. From the fact that the break in the lug was covered with sediment, plaintiff claimed that it must have been broken for a long enough period of time to give the District of Columbia notice, and this contention was sustained by the Court. No person was produced who had ever noticed the break in the cover. In the case at bar, ample testimony showed that the defect had been seen, or that it should have been seen by appellants or their employees. Appellee cites this case, not so much by way of reliance but to show through contrast the strength of its position in comparison to that of plaintiff in the *Payne* case. In this case, ample evidence of notice, actual

or constructive, is shown, while in the Payne case the Court upheld a submission to the jury on the theory of constructive notice, because the physical condition showed that the defect must have existed for quite some time. See *City of Hamilton vs. Haferkamp*, *supra*.

District of Columbia vs. Blackman, 32 App. 32, cited in Appellant's brief at page 7, is of no importance in solving the question involved in the case at bar. The situation in that case was that the District of Columbia admittedly had notice of the prosecution of the work by the issuance of the permit. Here notice is denied. The Court felt in that case, that the District had fulfilled its duty when its official seeing someone at the excavation a short time before the accident, assumed that a person was guarding the excavation. Actually he was not, but the District's action had nevertheless been reasonable. The excavation actually was completely unguarded for a considerably shorter time (about 15 minutes) than it may be reasonably assumed that the aisle in this case was in a dangerous condition. Length of time necessary for constructive notice to arise depends upon the facts in each case. *Woodbury vs. District of Columbia*, 136 U. S. 450, 34 L. Ed. 472; 10 S. Ct. 990. The aisle in the Richards case was in a public market and in a much frequented location therein, being at one of the main entrances to the market; and it is submitted that it was in a dangerous condition for a sufficient length of time to charge appellants with constructive notice thereof, and that the District of Columbia had reasonable time to effect a remedy. Furthermore appellee feels that there is evidence tending to show actual notice in the present case which was absent in the Blackman case. There also is no proprietary interest in the Blackman case such as existed in the Richards case.

Appellant's brief contains a very pertinent citation from the Blackman case, *supra* (See Appellant's Brief, 9). "In the present case, the District, having fulfilled its duty in the first instance, we do not think there was any evidence before the jury tending to show negligence on the part of the other defendant for the length of time before the accident to impute knowledge of such negligence to the District. This is equivalent to saying that there is not sufficient evidence on the record to support a judgment against the District, and that, therefore, its prayer for a directed verdict should have been granted". The record in the case at bar shows that defendant Stone had, from time to time in the past, permitted ice and water from his stand to remain on the floor in front of his stand; that the drain in the aisle had been clogged from time to time prior to the fall of appellee; and that appellant either knew or should have known, of this dangerous condition in the aisle and had had reasonable time to remedy the condition.

Appellant cites *Woolworth vs. Williams*, 59 App. 347, 41 Fed. 2nd, 970. Plaintiff fell while walking in the aisle of a store. There was testimony to the effect that the aisle had been swept a few minutes before plaintiff fell. No knowledge was shown. The Court said this was necessary. Appellee does not dispute that fact. It was held that it was insufficient to merely prove what caused the fall. The evidence must throw light on how the slippery substance came to be lying on the floor and that it had been there for a sufficient time to give defendant notice. The Court felt that the condition may have been created just before plaintiff entered the store. In the present case, there is ample testimony to show that ice and water remained on the floor of the market and that the drain was clogged not only at the time appellee fell but at various previous times. It was

also shown how it got there and where it came from and it can not be said that appellee contented himself with merely adducing evidence which proved only that there was a slippery substance on the floor. Therefore, the inapplicability of the Woolworth case is apparent.

Appellant refers to a long array of witnesses who testified as to the condition of the aisle over a period of time. Appellee says that there was sufficient testimony by the witness Schymansky, to entitle the jury to believe that the aisle was in a dangerous condition for a sufficient length of time to give appellant notice in law of such dangerous condition, if they did not have it in fact. The jury was entitled to believe that Schymansky was in a better position to ascertain the condition of the aisle, having been employed at the very stand where the accident occurred, than the witnesses called by appellant, who had no reason to make more than a casual inspection of the aisle. Reference to the record will show that, on cross examination of most of these witnesses by counsel for appellee, their recollection, if any, with regard to July 2, 1936, and for some time prior to that, was quite vague and uncertain, as might be expected in view of the fact that there was no reason for them to particularly inspect the aisle and drain in question. From the foregoing, it seems clear that the jury was warranted in giving more weight to Schymansky and to appellee than to appellant's witnesses. If there are fifty witnesses who testify one way and one who testifies another, the jury has the right to believe the one as against the fifty. Credibility of witnesses and the weight to be given to their testimony is a matter for the jury to determine. *Harrison vs. Davis Construction Co.*, 42 App. 255.

Appellee, himself, testified that he had seen ice on the floor before (Appellant's App. 22) and the jury was entitled to believe him and ignore the testimony of other witnesses who stated that the fact was otherwise.

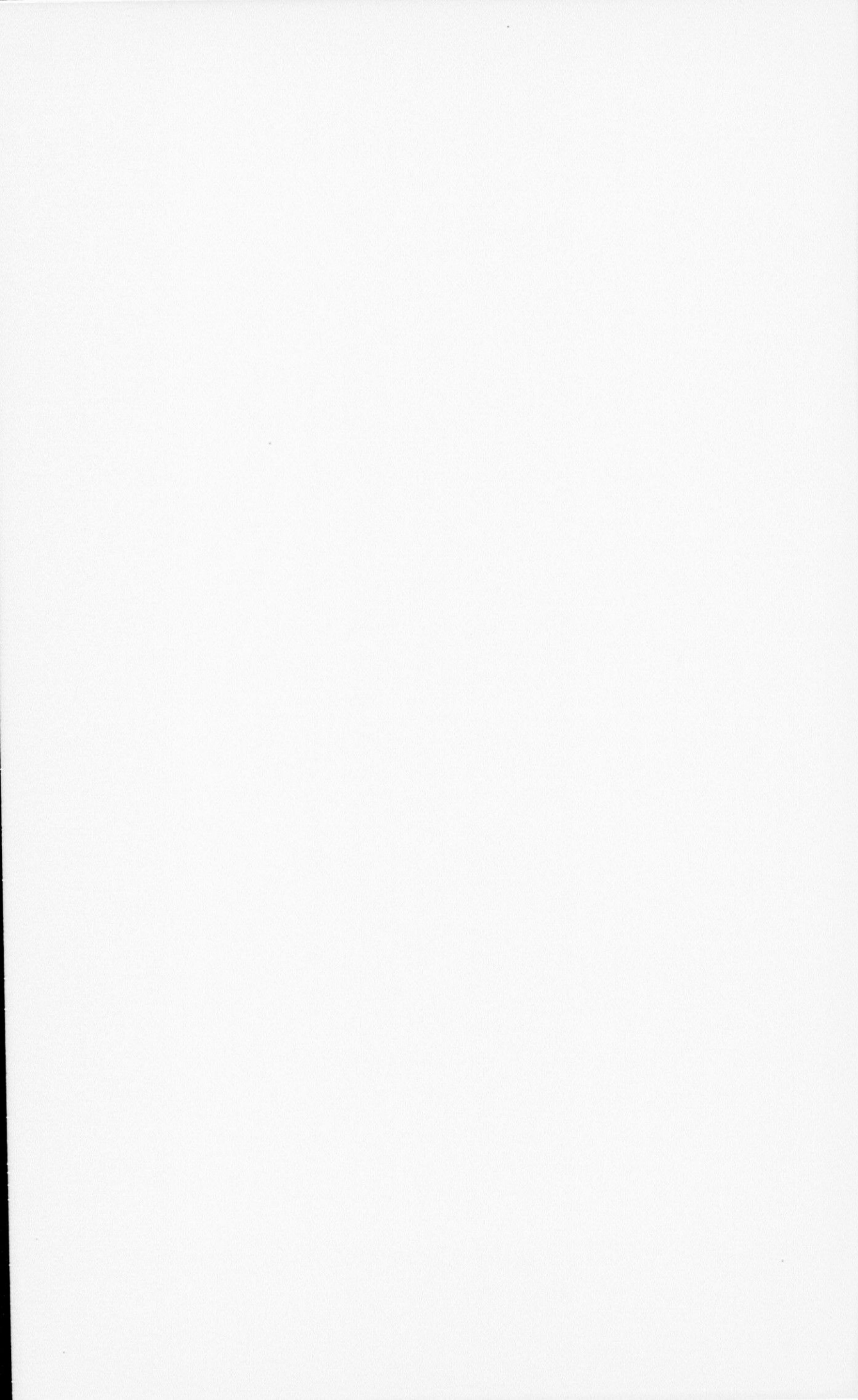
In view of the foregoing, it is respectfully submitted that the District Court properly overruled the Appellant's Motion for a Directed Verdict made at the conclusion of the whole case. "The question presented on a Motion to direct a verdict is whether admitting the truth of all the evidence given in favor of the party against whom the action is contemplated, together with such inferences as may reasonably be drawn from it, there is enough evidence reasonably to sustain a verdict in accordance therewith, and, where the evidence is conflicting, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated from consideration, leaving that evidence only which is favorable to the party against whom the motion is leveled". *Ubhoff vs. Brandenburg*, 26 App. D. C. 3 (1905). *Glaria vs. Wash. Southern Ry Co.*, 30 App. D. C. 559 (1908).

The verdict of the jury in favor of appellee and judgment thereon should be affirmed, with costs of this appeal assessed against appellant.

Respectfully submitted,

WILLIAM WENDELL,
JOHN A. WEIL,
RICHARD W. OLIVER,
402 Sixth Street, N. W.,
Washington, D. C.
Attorneys for Appellee.

APPENDIX.



**Testimony of John C. Schymansky on
Cross-Examination by Mr. Gray.**

(126) Q. Was the aisle slippery as a matter of fact? A. I have seen that aisle slippery.

**Testimony of George G. Richards, Plaintiff
on Direct Examination.**

(25) * * * By Mr. Wendell: Q. Now, Mr. Richards, on that day, before you were injured, were you suffering with any injury to your head or your right arm and right wrist?

A. No, sir.

Q. Or your right side? A. No, sir.

Q. Or your right groin? A. No, sir.

Q. Or your hip? A. No, sir.

Q. Or your back? A. No, sir.

Q. What was the condition of your health that day, before you were injured? A. Good, splendid.

Q. As a result of the fall which you had, in striking the right side of your body what parts of your body were injured? As a result of the fall what parts of your body were injured? A. I hit my head.

* * * * *

Q. What else did you injure? A. I broke my arm.

Q. What else? A. My side and hip; I bruised that. And then about three or four days after that I had a hernia come down on me.

Q. Which side? A. My right side.

Q. Did you hurt anything else? A. No—my back.

Q. What was done with your arm, your fractured arm?
A. It was first put in splints, and then I had to go to Provi-

dence Hospital to have an X-ray taken the next day. On the 4th of July, Dr. Van Natta was in the case, I think, about seven or eight weeks.

Q. Did you, before you were injured, have any discoloration of the right arm of any kind? A. No, sir.

Q. Did you, before your injury, have any pain or suffering from the right arm? (27) A. No, sir.

* * * * *

Q. Before you were injured, what about your ability to sleep? Could you sleep well before you were injured? A. Yes; I never had any trouble.

Q. How about your ability to sleep since you were injured? A. Not so good.

* * * * *

(28) Q. Tell us about the effects to your arm? How is your arm affected? A. I can't hardly use it; I can't put coal in the furnace; I can't hardly pick up a bucket of water with it.

* * * * *

Q. What other parts of the body were affected? A. That hernia—I have to wear a truss for that, to hold it up. If I didn't I wouldn't be able to walk.

Statement of Dr. Potter.

(46) The Court: * * * It is stipulated that if he were called to the witness stand he would testify in substance as is stated in this paper.

* * * * *

Mr. Wendell: If Dr. Potter was here he would testify in substance as follows (reading):

“That the plaintiff was injured on the 2nd day of July, 1936, and that shortly thereafter the plaintiff was examined and treated by Dr. Potter. The X-rays that had been taken showed a definite comminuted fracture of the lower extremity of the radius. That a physical examination by Dr. Potter disclosed that the plaintiff also had (47) bruises over his right arm and right hand and right wrist, and that the right wrist and right hand were sprained; that plaintiff’s right hip was severely injured, and that his right hip was bruised and sprained; that the plaintiff had bruises and a lump had developed over the side of his head; that the plaintiff’s back was bruised, and that the examination showed that there was a good deal of muscle spasm, limitation of motion, and severe strain of the lumbo-sacral and sacro-iliac areas of plaintiff’s back; that the plaintiff’s right groin was bruised and the muscles in and around the right groin, and the abdominal muscles were strained; that the plaintiff’s heart action was abnormal and the doctor believed that the plaintiff’s fall on July 2nd, 1936, caused, or contributed to cause, this abnormal heart action; that it was Dr. Potter’s opinion that these injuries were the result of the fall which the plaintiff had on July 2nd, 1936; that as a result of the injuries to his right side there developed pleurisy in plaintiff’s chest; that the plaintiff was extremely nervous as a result of the injuries he received; that Dr. Potter has treated the plaintiff from time to time since first examined him up to the middle part of 1939; that Dr. Potter has given such treatments as strappings and light treatments and massage to the plaintiff, and medicines, etc.; that the plaintiff suffered, from time to time since he was injured, up to the last time Dr. Potter saw him in 1939, from headaches and dizzy spells; that plaintiff had suffered from time to time during that period of time up to the last time (48) Dr. Potter saw him in 1939

with pleurisy, and he had suffered also during that period of time from the injury to his heart; that the plaintiff also suffered during that period of time from the injury to his arm and hand and wrist from time to time since he was injured, and suffered during that period of time from the injury to his back; that in Dr. Potter's opinion plaintiff's right arm and right hand had become, as a result of the accident, permanently discolored, and that there was a permanent injury to his nerves, in and about his right arm and right hand and there was a permanent injury to the nerves and muscles and blood circulatory system in his right arm; that in Dr. Potter's opinion there was a permanent injury to his right arm and right wrist and right hand; that the plaintiff continued to suffer during the time he was treated by Dr. Potter, with muscle spasm, much limitation of motion, and strain of the sacro-iliac areas and lumbo-sacral areas of his back, and that in Dr. Potter's opinion there was a permanent injury to his back; that the plaintiff during the time he was treated by Dr. Potter also continued to suffer with pleurisy in his right side, and to suffer from the strain and injury to his right side and the injury to his right groin and his abdominal muscles; and that in Dr. Potter's opinion there had developed a permanent hernia in plaintiff's right groin area; that the plaintiff suffered from the injury to his nerves during the time he was treated by Dr. Potter."

